(17,924.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 439.

THE ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT L. PURDY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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a Court of Appeals.

ALBERT L. PURDY, Plaintiff and Respondent,
against
ERIE RAILROAD COMPANY, Defendant and Appellant.

Appeal Book.

Albert L. Purdy, attorney in person for plaintiff and respondent, Wellsville, N. Y.

Moot, Sprague, Brownell & Marcy, attorneys for defendant and appellant, 45 Erie County Savings Bank building, Buffalo, N. Y.

1 *Statement under Rule* 41.

This is a consolidated action consisting of certain actions begun by Albert L. Purdy as plaintiff against Erie Railroad Company, defendant, which were previous to consolidation known as actions "A," "B" and 1 to 19 inclusive.

Action known as action No. 1, Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, was commenced by the service of summons and complaint upon defendant on the 29th day of June, 1896. A demurrer was served thereto which was subsequently overruled and answer served on the 11th day of October, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, Erie Railroad Company, defendant.

Action known as action No. 2 was commenced by the service of summons and complaint on the defendant on the 30th day of June, 1896. The defendant's answer thereto was served on the 1st day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 3 was begun by service of summons and complaint on defendant on the 2nd day of July, 1896. Defendant's answer thereto was served on the 1st day of September, 1896, and the names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

2 Action known as No. 4 was commenced by the service of summons and complaint on defendant on the 7th day of July, 1896. The defendant's answer thereto was served on the 1st day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 5 was commenced by the service of summons and complaint on defendant on the 13th day of July, 1896. The defendant's answer thereto was served on the 1st day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 6 was commenced by the service of summons and complaint on defendant on the 13th day of August, 1896. The defendant's answer thereto was served on the 2nd day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 7 was commenced by the service of summons and complaint on defendant on the 17th day of August, 1896. The defendant's answer thereto was served on the 8th day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 8 was commenced by the service of summons and complaint on defendant on the 24th day of
3 August, 1896. The defendant's answer thereto was served on the 14th day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 9 was commenced by the service of summons and complaint on defendant on the 26th day of August, 1896. The defendant's answer thereto was served on the 15th day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 10, was commenced by the service of summons and complaint on defendant on the 28th day of August, 1896. The defendant's answer thereto was served on the 11th day of September, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 11, was commenced by the service of summons and complaint on defendant on the 30th day of October, 1896. The defendant's answer thereto was served on the 19th day of November, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 12, was commenced by the service of summons and complaint on defendant on the 9th day of November, 1896. Amended complaint was served on the 23rd day of November, 1896. The defendant's answer thereto was served on the
4 12th day of December, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 13, was commenced by the service of summons and complaint on defendant on the 12th day of March, 1897. The defendant's answer thereto was served on the 1st day of April, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 14, was commenced by the service of summons and complaint on defendant on the 28th day of July, 1897. The defendant's answer thereto was served on the 6th day of September, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 15, was commenced by the service of summons and complaint on defendant on the 2nd day of August, 1897. The defendant's answer thereto was served on the 6th day of September, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 16, was commenced by the service of summons and complaint on defendant on the 6th day of August, 1897. The defendant's answer thereto was served on the 6th day of

September, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

5 Action known as action No. 17, was commenced by the service of summons and complaint on defendant on the 9th day of August, 1897. The defendant's answer thereto was served on the 6th day of September, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 18, was commenced by the service of summons and complaint on defendant on the 13th day of August, 1897. The defendant's answer thereto was served on the 6th day of September, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as action No. 19, was commenced by the service of summons and complaint on defendant on the 31st day of August, 1897. The defendant's answer thereto was served on the 6th day of September, 1897. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as "A" was begun in the justice's court of the town of Wellsville. Summons returnable on the 12th day of November, 1896, and answer served on the 1st day of December, 1896. The names of the original parties in full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

Action known as "B" was begun in justice's court, town of Wellsville. Summons returnable November 14th and answer put in December 1st, 1896. The names of the original parties in

6 full are Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant.

The above actions Nos. 2 to 12 inclusive were consolidated by an order granted by Justice Childs on the 1st day of December, 1896, and were subsequently thereto known as consolidated action.

Action No. 13 was consolidated with the consolidated action by an order granted on the 28th day of April, 1897.

Actions Nos. 14 to 19 inclusive were consolidated with said consolidated action by an order granted on the 27th day of September, 1897.

The justice court actions known as "A" and "B" were removed from justice court and consolidated with the consolidated action by an order granted December 1st, 1896. There has been no change of parties or attorneys in the above-entitled actions or in the consolidated actions since the commencement thereof.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant.

To the above-named defendant:

You are hereby summoned to answer the complaint in this
7 action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 27th day of June, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant.

The above-named plaintiff, for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws
8 of the State of New York, for the purpose of engaging in the carrying of freight and passengers for hire, as a common carrier.

Second. That at the time hereinafter set forth, said defendant was, and now is, operating a railroad, in the State of New York, the line of which, and the lines of which, are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile, to wit: three cents per mile and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile, for the transportation of passengers.

Third. That the said lines of the said railroad so operated by the defendant extend through, within the corporate limits of the village of Wellsville, a village duly incorporated under the laws of the State of New York and situate in the county of Allegany, said State, and that said defendant had, prior to the time hereinafter set forth, established a station, on its said line, in said incorporated village of Wellsville, for the accommodation of its passengers and in such station established a ticket office, within which ticket office said defendant kept a ticket agent stationed, for the regular sale of tickets to passengers for carriage upon its said line and lines of rail-

road, and that said station and ticket office were so maintained, for such purpose by said defendant at the time hereinafter set forth and tickets regularly sold thereat for such carriage, on its said lines.

Fourth. The plaintiff further alleges, that upon the 26th
9 day of June, 1896, this plaintiff duly made application to the said defendant, at its said ticket office, in the said incorporated village of Wellsville, of its ticket agent therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto and demanded that the defendant issue to the plaintiff or to the plaintiff and family such mileage book, required to be kept for sale thereat, by the provisions of an act entitled "An act in relation to the issues of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896 of the State of New York. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book by handing said money to and offering the same to said ticket agent within said ticket office at the place so established. That said defendant, in violation of the provisions of said act, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same when requested and demanded. The plaintiff further alleges, upon information and belief, that the said defendant did not at said time and does not now keep such mileage book for sale at its said ticket office as required. All against the form of the said statute, section 1 of chapter 1027 of the Laws of 1895, as amended by section 1 of chapter 835 of the Laws of 1896.

Fifth. That by such refusal to issue said mileage book the said defendant forfeited and became liable to pay to the plaintiff
10 the sum of fifty dollars, and which the plaintiff thereby became entitled to recover of the said defendant, and the defendant thereby became indebted to the plaintiff in said sum of $50 and to recover which sum so forfeited under said statute for such refusal this action is brought, which is plaintiff's damages therefor and which remains wholly unpaid. That one year has not elapsed since said cause of action accrued to plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, besides the costs of this action.

Dated June 27, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, N. Y.

ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and that the same is true to the knowledge of the deponent

except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

ALBERT L. PURDY.

Subscribed and sworn to before me this 27th day of June, 1896.

JOHN W. BLACKBURN,
Notary Public.

11 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "2."

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 29th day of June, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

12 Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "2."

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of the State of New York, for the purpose of conveying persons and property for hire, as common carriers.

Second. That at the time hereinafter set forth, said defendant was, and now is, operating a railroad in the State of New York, the line of which and the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile, to wit: three cents per mile; and which does charge and did charge at the time herein set forth a maximum fare of more than two cents per mile for conveying passengers.

Third. That the said lines of the said railroad so operated by the defendant extend through, within the corporate limits of the village of Wellsville, a village duly incorporated under the laws of the

State of New York and situate in the county of Allegany,
13 said State, and that said defendant had, prior to the time hereinafter set forth, established a station on its said line, in said incorporated village of Wellsville, for the accommodation of its passengers, and in such station established a ticket office, within which ticket office said defendant kept a ticket agent stationed for the regular sale of tickets to passengers for carriage upon its said line and lines of railroad, and that said station and ticket office were so maintained for such purpose by said defendant at the time hereinafter set forth and tickets regularly sold thereat for such carriage on its said lines.

Fourth. The plaintiff further alleges that upon the 29th day of June, 1896, this plaintiff duly made application to the said defendant at its said ticket office in said village of Wellsville of its ticket agent therein, acting as such and in charge thereof for a mileage book, having one thousand coupons attached thereto and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat by the provisions of an act entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896 of the State of New York. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book by handing said money to and offering the same to said ticket agent within said ticket office at the place so established. That plaintiff was then and now is ready and willing to pay said sum therefor. That
14 said defendant, in violation of the provisions of said act, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue the same when requested and demanded. The plaintiff further alleges upon information and belief that the said defendant did not at said time and does not now keep such mileage books for sale at its said ticket office as required. All against the form of the said statute.

Fifth. That by such refusal to issue said mileage book to plaintiff on his application, as set forth above, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, and which sum the plaintiff thereby became entitled to recover of the said defendant therefor, and the defendant thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited under said statute for such refusal this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant

for the sum of fifty dollars and interest from this date, besides the costs of this action.

Dated June 29th, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

15 ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and that the same is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn to before me this 29th day of June, 1896.

E. A. CHILDS,
Notary Public.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "3."

To the above-named defendant:

You are hereby summoned, to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
16 the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in county of Allegany.

Dated the 1st day of July, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, N. Y.

Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action Number "3."

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the carriage of persons and property for hire, as common carriers.

17 Second. That at the time hereinafter set forth, said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile, to wit, three cents per mile; and which does charge and did charge at the time herein set forth a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That defendant's said lines extend through said village. That defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station on said lines and in said incorporated village of Wellsville and then maintained the same for such purpose and by its ticket agent therein employed, regularly selling tickets, thereat, for such transportation.

Fourth. That upon the first day of July, 1896, this plaintiff duly made application to said defendant, at its said ticket office in said village of Wellsville, of its ticket agent therein, acting as such and in charge thereof, for a mileage book having one thousand coupons attached thereto and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws

18 of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer*ed* to issue such mileage book to plaintiff, when requested and demanded. Plaintiff further alleges upon information and belief that the said defendant did not at said time and does not now keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant, therefor, and the defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages, herein, and to recover which sum so forfeited, under said statute for such refusal, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

19 Wherefore, the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, besides the costs of this action.

Dated July 1st, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

ALLEGANY COUNTY, ss:

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action; and that he has read the foregoing complaint and knows the contents thereof and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn to before me this 1st day of July, 1896.
H. J. TORREY,
Notary Public.

20 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "4."

To the above-named defendants:

You are hereby summoned, to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated, the 3rd day of July, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

21 Supreme Court, State of New York, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "4."

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this

State, for the carriage of persons and property for hire as a common carrier.

Second. That at the time hereinafter set forth, said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile; to wit, three cents per mile; and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on
22 its said lines, at its station on said lines and in said incorporated village of Wellsville and then maintained the same for such purpose and by its ticket agent therein employed, regularly, selling tickets, thereat, for such transportation.

Fourth. That upon the 3rd day of July, 1896, this plaintiff duly made application to said defendant, at its said ticket office in said village of Wellsville, of its ticket agent, therein acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the line or lines of such railroad, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled, "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of *twenty* dollars, lawful money of the United States, to pay for such mileage book, by handing the same and offering it to said ticket agent, within said office, at the place so established. That the plaintiff was, then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue such mileage book to plaintiff when requested or demanded. Plaintiff further alleges upon information and belief that the said defendant did not at said
23 time and does not now keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant, therefor, and the said defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited, under said

statute, for such refusal to issue said mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date and the costs of this action.

Dated, July 3rd, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

ALLEGANY COUNTY, ss:

24 Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and that the same is true, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn — before me this 3rd day of July, 1896.

CALEB S. HALL,
Notary Public.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "5."

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer,

25 judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 11th day of July, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, N. Y.

Supreme Court, State of New York, Allegany county.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "5."

The above-named plaintiff, for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State for the purpose of the carriage of persons and property for hire as a common carrier.

26 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile, to wit: three cents per mile; and which does charge and did charge at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said line.

Third. That Wellsville is a village duly incorporated under the laws of the State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers for transportation on its said lines at its station on said lines and in said incorporated village of Wellsville, and then maintained the same for such purpose and by its ticket agent therein employed regularly selling tickets thereat for such transportation.

Fourth. That upon the 10th day of July, 1896, this plaintiff duly made application to said defendant at its said ticket office in said village of Wellsville of its ticket agent therein, acting as such and in charge thereof, for a mileage book having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the line or lines of such railroad, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat by the provision of an act, entitled "An act in relation to the issue of mileage books by railroad corpora-

27 tions," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book by handing the same to said ticket agent within said ticket office at the place so established. That plaintiff was then and now is ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue such mileage book to plaintiff on such application and demand. Plaintiff further alleges on information and belief that the said defendant did not at said time and

does not now keep such mileage books for sale at its said ticket office as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, and which sum the plaintiff thereby became entitled to recover of the said defendant therefor, and the said defendant thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited under said statute for such refusal to issue said mileage book this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

28 Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date and costs of this action.

Dated July 11th, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action, and that the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn to before me this 11th day of July, 1896.
CHARLES R. SCOTT,
Notary Public.

29 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "6."

To the above-named defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 12th day of August, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and P. O. address, Wellsville, Allegany Co., N. Y.

30 Supreme Court, State of New York, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "6."

The above-named plaintiff, for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, to wit: three cents per mile; and which does charge and did charge, at the time set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant
31 had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station on said lines and in said incorporated village of Wellsville and there maintained the same for such purpose and by its ticket agent therein employed, regularly, selling tickets thereat for such transportation.

Fourth. That upon the 12th day of August, 1896, this plaintiff duly made application of said defendant, at its said ticket office, in said village, to its ticket agent therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the line or lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issues of *village* books by railroad corporations," constituting chapter 1027 of the Laws of 1895; as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by offering the same to said ticket agent at the place where tickets were delivered, within said ticket office, in the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue such mileage book
32 to plaintiff, on such application and demand. Plaintiff further alleges on information and belief that the said defendant did

not at said time and does not now keep such mileage books for sale at the said ticket office as required.

Fifth. That by such refusal to issue such mileage book to plaintiff, on his application as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff thereby became entitled to recover of the said defendant therefor, and the said defendant thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited under said statute, for such refusal to issue said mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has elapsed since said cause of action accrued to the plaintiff. Therefore, the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, and costs of this action.

Dated August 12th, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and P. O. address, Wellsville, Allegany Co., N. Y.

33 ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action, and that the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

A. L. PURDY.

Sworn — before me this 12th day of August, 1896.

CALEB S. HALL,
Notary Public.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "7."

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer,
34 judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 15th day of August, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, State of New York, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "7."

The above-named plaintiff, for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of the State of New York, for the purpose of the carriage of persons and property for hire as a common carrier.

35 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile, to wit: three cents per mile; and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village; that said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers for transportation on its said lines, at its said station, and in said incorporated village of Wellsville, and then maintained the same for such purpose and by its ticket agent therein employed regularly selling tickets thereat for such transportation.

Fourth. That upon the 15th day of August, 1896, this plaintiff duly made application to said defendant, at its said ticket office in said village of Wellsville, of its ticket agent therein employed, acting as such and in charge thereof, for a mileage book having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of its railroad, and demanded that the defendant issue to the plaintiff such mileage book, required

36 to be kept for sale thereat by the provisions of an act entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for the same by handing said sum to the said ticket agent within said ticket office at the place so established. That plaintiff was then and now is ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue such mileage book to plaintiff on such application and demand. Plaintiff further alleges on information and belief that the said defendant did not at said time and

does not now keep such mileage books for sale at its said ticket office as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, and which sum the plaintiff thereby became entitled to recover of the said defendant therefor, and the said defendant thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited under said statute for such refusal to issue said mileage book this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

37 Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date and costs of this action.

Dated August 15, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

ALLEGANY COUNTY, ss:

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that the foregoing complaint is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn to before me this 15th day of August, 1896.

CALEB S. HULL,
Notary Public.

38 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "8."

To the above-named defendant:

You are hereby summoned, to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judg-

ment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 22nd day of August, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

39 Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "8."

The above-named plaintiff for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State for the purpose of the carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office
40 for the regular sale of tickets to its passengers, for transportation on its said lines, at its said station and in said incorporated village of Wellsville and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 22nd day of August, 1896, this plaintiff duly made application to said defendant, at its said ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same

and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act, and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue such mileage book to plaintiff, when requested and demanded. Plaintiff further alleges upon information and belief that the said defendant did not at said time
41 and does not now keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant, therefor, and the said defendant, thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages, herein, and to recover which sum so forfeited, under said statute, for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date and costs of this action.

Dated August 22nd, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

42 ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn — before me, this 22nd day of August, 1896.

CLAUDE R. GROTE,
Notary Public.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "9."

To the above-named defendant:

You are hereby summoned, to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of the summons, exclusive of the day of service; and in case of your failure to appear or answer,
43 judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 25th day of August, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and P. O. address, Wellsville, Allegany Co., N. Y.

Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "9."

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State for the purpose of the carriage of persons and property for hire, as a common carrier.

44 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its said station and in said incorporated village of Wellsville, and then maintained the same for such purpose and regularly sold tickets thereat for such transportation.

Fourth. That upon the 25th day of August, 1896, this plaintiff duly made application to said defendant, at its ticket office in said village of Wellsville, to its ticket agent therein, acting as such and

in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled, "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835
45 of the Laws of 1896. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act, and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue such mileage book to plaintiff, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not at said time and does not now keep such mileage books for sale at its said ticket office as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant therefor and the *same* defendant thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited, under said statute, for such refusal to issue such mileage book this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

46 Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from the date and costs of this action.

Dated August 25, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and P. O. address, Wellsville, Allegany Co., N. Y.

ALLEGANY COUNTY, *ss*:

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and has read the foregoing complaint and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

A. L. PURDY.

Subscribed and sworn to before me this 25th day of August, 1896.

JOHN W. BLACKMAN,
Notary Public.

47 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "10."

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 27th day of August, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

48 Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "10."

The above-named plaintiff, for a cause of action herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is village, duly incorporated under the laws of this State, in the county of Allegany. That said de-
49 fendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its said station and in said incorporated

village of Wellsville, and then maintained the same for such purpose and regularly sold tickets, thereat for such transportation.

Fourth. That upon the 27th day of August, 1896, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested
50 and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not, at said time, and does not now, keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant therefor, and the said defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages, herein, and to recover which sum, so forfeited, under said statute, for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date and costs of this action.

Dated August 27th, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

51 ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and knows the contents thereof and that the same is true to

the knowledge of deponent except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Sworn — before me this 27th day of August, 1896.
JNO. W. BLACKMAN,
Notary Public.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "11."

To the above-named defendant:

You are hereby summoned, to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
52 the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 29th day of October, 1896.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, County of Allegany, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "11."

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, for his amended complaint, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property, for hire, as a common carrier.

53 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had,

prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 31st day of August, 1896, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad upon surrendering at any ticket, office on said lines, coupons equal in number to the miles plaintiff or a member of his family wish- to travel, to a ticket entitling the holder to the same rights and privileges in respect to trans-
54 portation of person and property as the highest class ticket issued by defendant, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. The plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not, at said time, and does not now, keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff thereby, became entitled to recover of the said defendant, therefor, and the said defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's dam-
ages herein, and to recover which sum, so forfeited, under
55 said statute, for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for

the sum of fifty dollars and interest from this date, and costs of this action.

Dated November 20th, 1896.

A. L. PURDY,
Plaintiff's Attorney in Person.

Office and post-office address, Wellsville, Allegany county, N. Y.

ALLEGANY COUNTY, *ss*:

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and knows the contents thereof, and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Sworn — before me this 29th day of November, 1896.

H. J. TORREY,
Notary Public.

56 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "12."

To the above-named defendant:

You are hereby summoned, to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated the 7th day of November, 1896.

Trial desired in the county of Allegany.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

57 Supreme Court, State of New York, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "12."

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon *the* information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office
58 for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 7th day of November, 1896, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was, then, and now is, ready and willing to pay said sum for such mileage book. That said defendant in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said
59 defendant did not, at said time, and does not now, keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant, therefor, and the said defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages, herein, and to recover which sum, so forfeited, under said statute, for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, and costs of this action.

Dated Nov. 7th, 1896.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

60 ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says, that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and knows the contents thereof, and that the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Sworn — before me this 7th day of November, 1896.

H. J. TORREY,
Notary Public.

Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action Number 12.

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, for his amended complaint, alleges:

61 First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State of New York, for the purpose of carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth, defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile); and which does charge and did charge at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said line.

Third. That Wellsville is a village duly incorporated under the laws of the State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers for transportation on its said lines at its station and in said village and then maintained the same for such purpose and regularly sold tickets thereat for such transportation.

Fourth. That upon the 7th day of November, 1896, this plaintiff duly made application to said defendant at its ticket office in said village of Wellsville to its ticket agent therein, acting as such and in charge thereof, for a mileage book having one thousand coupons attached thereto, entitling the holder thereof to travel one
62 thousand miles on the lines of such railroad, upon surrendering, at any ticket office on said lines, coupons equal in number to the miles plaintiff or a member of his family wish- to travel, to a ticket, entitling the holder to the same rights and privileges in respect to transportation of person and property, as the highest class ticket issued by defendant, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book by handing the same to and offering it to said ticket agent within said office at the place so established. That plaintiff was then and now is ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue the same when requested and demanded. Plaintiff further alleges upon information and belief that the said defendant did not at said time and does not now keep such mileage books for sale at its said ticket office, as required. All against the form of such statute.

Fifth. That by such refusal to issue such mileage book to plaintiff on his application, as aforesaid, the said defendant forfeited
63 and became liable to pay to the plaintiff the sum of fifty dollars, and which sum the plaintiff thereby became entitled to recover of the said defendant therefor, and the said defendant thereby became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited under said statute for such refusal to issue said mileage book this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, besides the costs of this action.

Dated November 20th, 1896.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

ALLEGANY COUNTY, *ss:*

Albert L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action; and that he has read the foregoing complaint and knows the contents thereof and that the same is true to the knowledge of deponent, except as to the matters therein
64 stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Sworn — before me this 20th day of November, 1896.

H. J. TORREY,
Notary Public.

Summons.

Action to recover a forfeiture according to the provisions of chapter 1027 of the Laws of 1895, entitled "An act in relation to the issue of mileage books by railroad corporations," as amended by chapter 835 of the Law- of 1896, of fifty dollars.

ALLEGANY COUNTY, *Town of Wellsville,* } *ss:*

The People of the State of New York to any constable of said county, Greeting:

You are hereby commanded to summon Erie Railroad Company to appear before the undersigned, a justice of the peace of said town, on the 18th day of November, 1896, at one o'clock in the afternoon, at his office in the village of Wellsville, in said town, to answer the complaint of Albert L. Purdy in a civil action.

Given under my hand, this 12th day of November, 1896.

HIRAM J. TORREY,
Justice of the Peace.

65 Justice Court, Allegany County.

Before H. J. Torrey, Justice.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. A.

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth, said defendant was, and now is, operating a railroad, in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and

not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant
66 had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly, sold tickets, thereat, for such transportation.

Fourth. That upon the twelfth (12th) day of November, 1896, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad, upon surrendering at any ticket office on said lines coupons equal in number to the miles plaintiff or a member of his family wish to travel, to a ticket entitling the holder to the same rights and privileges in respect to transportation of person and property as the highest class ticket issued by defendant, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled, "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was, then, and now is, ready and willing to
67 pay said sum for such mileage book. That said defendant in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges upon information and belief, that the said defendant did not at said time and does not now, keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant, therefor, and the said defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum so forfeited, under said statute, for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date and costs of this action.

Dated November 18th, 1896.

A. L. PURDY,
Plaintiff, Wellsvillle, Allegany County, N. Y.

68 *Summons.*

Action to recover a forfeiture according to the provisions of chapter 1027 of the Laws of 1896, entitled "An act in relation to the issue of mileage books by railroad corporations," as amended by chapter 835 of the Laws of 1896, of fifty dollars.

ALLEGANY COUNTY, } ss.:
Town of Wellsville, }

The People of the State of New York to any constable of said county, Greeting:

You are hereby commanded to summon Erie Railroad Company to appear before the undersigned, a justice of the peace of said town, on the 24th day of November, 1896, at one o'clock in the afternoon, at his office in the village of Wellsville in said town to answer the complaint of Albert L. Purdy in a civil action.

Given under my hand, this 14th day of November, 1896.

Signed by— HIRAM J. TORREY,
Justice of the Peace.

69 Justice Court, Allegany County, State of New York.

By H. J. Torrey, Justice.

ALBERT L. PURDY, Plaintiff, } Action No. B.
against
ERIE RAILROAD COMPANY, Defendant. }

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire as a common carrier.

Second. That at the time hereinafter set forth, said defendant, was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the

laws of this State, in the county of Allegany. That said de-
70 fendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 14th day of November, 1896, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad, upon surrendering at any ticket office on said lines coupons equal in number to the miles plaintiff or a member of his family wish- to travel, to a ticket entitling the holder to the same rights and privileges in respect to transportation of person and property as the highest class ticket issued by defendant and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then,
71 and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges upon information and belief that the said defendant did not, at said time and does not now keep such mileage books for sale at its said ticket office, as required. All against the form of the said statute.

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff, thereby, became entitled to recover of the said defendant therefor, and the defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages, herein, and to recover which sum so forfeited, under said statute for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, and costs of this action.

Dated November 24th, 1896.

(Signed) A. L. PURDY, *Plaintiff.*

72 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 13.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 10th day of March, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, N. Y.

73 Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 13.

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge at the time herein set forth a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on
74 its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets thereat, for such transportation.

Fourth. That upon the 17th day of November, 1896, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and

in charge thereof, for a mileage book having one thousand coupons attached thereto entitling the holder thereof, upon surrendering at any ticket office on said lines, coupons equal in number to the miles, plaintiff or a member of his family wish- to travel to a ticket entitling the holder to the same rights and privileges in respect to transportation of persons and property as the highest class ticket issued by defendant, to travel one thousand miles on lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book required to be kept for sale thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book.

That said defendant in violation of the provisions of said act
75 and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not, at said time, and does not now, keep such mileage books for sale at its said ticket office, as required. All against the form of the *such* statute.

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars and which sum the plaintiff thereby became entitled to recover of the said defendant, therefor, and the said defendant, thereby, became indebted to the plaintiff in said sum of $50, which is plaintiff's damages herein, and to recover which sum, so forfeited, under said statute, for such refusal to issue such mileage book, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore plaintiff demands judgment against the defendant for the sum of fifty dollars and interest from this date, and costs of this action.

Dated March 10th, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

76 ALLEGANY COUNTY, *ss:*

A. L. Purdy, being duly sworn, says that he is the plaintiff in the above-entitled action and that he has read the foregoing complaint and knows the contents thereof, and that the same is true to

the knowledge of the deponent except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

A. L. PURDY.

Sworn — before me this 11th day of March, 1897.

H. J. TORREY,
Notary Public.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "14."

To the above-named defendant:

You are hereby summoned to answer the complaint in this
77 action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 28th day of July, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, N. Y.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. "14."

The above-named plaintiff, for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State for the purpose of the carriage of persons and property for hire as a common carrier.

78 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which does not overcome an elevation exceeding three hundred feet to the mile within a distance of two miles, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile); and which does charge and did charge at the time herein set forth a maximum fare of more than two cents per mile for conveying passengers, on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 28th day of July, 1897, this plaintiff duly made applicatian to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat,

79 by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896 as amended by chapter 484 of the Laws of 1897, entitling the said holder, (plaintiff,) or any member of his family or firm, or any salesman of his firm to whom such book is delivered by him, upon surrendering, at any ticket office on the line or lines of such railroad coupons equal in number to the number of miles which he or such member of his family or firm, or such salesman of such firm wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor, entitling the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act, and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not keep such mileage books for sale at its said ticket office. All against the form of said statute.

Fifth. That by such refusal to issue such mileage book to

80 the plaintiff, on his application as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, which is plaintiff's damages herein, and to recover which sum, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant

for the sum of fifty dollars and interest from this date, and costs of this action.

Dated July 28th, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 15.

To the above-named defendant:

You are hereby summoned to answer the complaint in this
81 action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 21st day of July, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, N. Y.

Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action Number 15.

The above-named plaintiff for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common carrier.

82 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which does not overcome an elevation exceeding three hundred feet to the mile within a distance of two miles, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile), and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's

said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 31st day of July, 1897, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat,

83 by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, as amended by chapter 484 of the Laws of 1897, entitling said holder, (plaintiff), or any member of his family or firm, or any salesman of his firm to whom such book is delivered by him, upon surrendering, at any ticket office on the line or lines of such railroad coupons equal in number to the number of miles which he or such member of his family or firm, or such salesman of such firm wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor, entitling the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff, and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not keep such mileage books for sale at its said ticket office. All against the form of said statute.

Fifth. That by such refusal to issue such mileage book to

84 the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, which is plaintiff's damages herein, and to recover which sum this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for

the sum of fifty dollars and interest from this date, and costs of this action.

Dated July 31st, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action Number 16.

To the above-named defendant:

You are hereby summoned to answer the complaint in this
85 action and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 5th day of August, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, N. Y.

Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 16.

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common-carrier.

86 Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length, and which does not overcome an elevation exceeding three hundred feet to the mile within a distance of two miles, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile) and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of this State, in the county of Allegany. That said defendant's

said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 5th day of August, 1897, this plaintiff duly made application to said defendant at its ticket office in said village of Wellsville, to its ticket agent therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat by the provisions of an act entitled
87 "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, as amended by chapter 484 of the Laws of 1897, entitling the said holder (plaintiff), or any member of his family or firm, or any salesman of his firm to whom such book is delivered by him, upon surrendering, at any ticket office on the line or lines of such railroad, coupons equal in number to the number of miles which he or such member of his family or firm, or such salesman of such firm wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor, entitling the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not keep such mileage books for sale at its ticket office. All against the form of said statute.

88 Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, which is plaintiff's damages herein, and to recover which sum this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for

the sum of fifty dollars and interest from this date, and costs of this action.

Dated August 5th, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 17.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney
89 within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in county of Allegany.

Dated the 7th day of August, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, N. Y.

Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 17.

The above-named plaintiff, for a cause of action, herein, against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire, as a common carrier.

90 Second. That at the time hereinafter set forth said defendant was, and now is operating a railroad in this State, the lines of which are more than one hundred miles in length and which does not overcome an elevation exceeding three hundred feet to the mile within a distance of two miles, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile) and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the laws of the State, in the county of Allegany; that said defendant's

said lines extend through said village. That said defendant had prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village, and then maintained the same for such purpose and regularly sold tickets, thereat, for such transportation.

Fourth. That upon the 7th day of August, 1897, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, as amended by chapter 484 of the Laws of 1897, entitling the said holder (plaintiff), or any member of his family or firm, or any salesman of his firm to whom such book is delivered by him, upon surrendering, at any ticket office on the line or lines of such railroad coupons equal in number to the number of miles which he or such member of his family or firm, or such salesman of such firm wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor, entitling the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not keep such mileage books for sale at its said ticket office. All against the form of said statute.

91

Fifth. That by such refusal to issue such mileage book to the plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, which is plaintiff's damages, herein, and to recover which sum this action is brought.

92

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defendant for

the sum of fifty dollars and interest from this date and costs of this action.

Dated August 7th, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

93 Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 18.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 12th day of August, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, N. Y.

94 Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 18.

The above-named plaintiff, for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State, for the purpose of the carriage of persons and property for hire as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State, the lines of which are more than one hundred miles in length and which does not overcome an elevation exceeding three hundred feet to the mile within a distance of two miles, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, to wit: three cents per mile; and which does charge and did charge, at the time set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village duly incorporated under the laws of this State, in the county of Allegany. That said defendant's

said lines extend through said village. That said defendant
95 had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station and in said village of Wellsville and then maintained the same for such purpose and regularly sold tickets thereat for such transportation.

Fourth. That upon the 11th day of August, 1897, this plaintiff duly made application to said defendant, at its ticket office in said village of Wellsville, to its ticket agent therein, acting as such and in charge thereof, for a mileage book having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale thereat by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, as amended by chapter 484 of the Laws of 1897, entitling the said holder (plaintiff), or any member of his family or firm, or any salesman of his firm to whom such book is delivered by him, upon surrendering, at any ticket office on the line or lines of such railroad coupons equal in number to the number of miles which he or such member of his family or firm or such salesman of such firm wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor, entitling the holder thereof to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corpo-
96 ration would entitle him. That at the same time with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same when requested and demanded. Plaintiff furth- alleges upon information and belief that the said defendant did not keep such mileage books for sale at its said ticket office. All against the form of said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff, on his application as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars which is plaintiff's damages, herein, and to recover which sum, this action is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

Wherefore, plaintiff demands judgment against the defend-

97 ant for the sum of fifty dollars and interest from this date and costs of this action.

Dated August 12, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 19.

To the above-named defendant:

You are hereby summoned, to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of the summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Trial desired in the county of Allegany.

Dated the 30th day of August, 1897.

A. L. PURDY,
Plaintiff's Attorney.

Office and P. O. address, Wellsville, N. Y.

98 Supreme Court, Allegany County, State of New York.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 19.

The above-named plaintiff for a cause of action herein against the above-named defendant, alleges:

First. Upon information and belief, that the said defendant is a domestic railroad corporation, duly organized under the laws of this State for the purpose of the carriage of persons and property for hire, as a common carrier.

Second. That at the time hereinafter set forth said defendant was, and now is, operating a railroad in this State the lines of which are more than one hundred miles in length and which does not overcome an elevation exceeding three hundred feet to the mile within a distance of two miles, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile (to wit, three cents per mile) and which does charge and did charge, at the time herein set forth, a maximum fare of more than two cents per mile for conveying passengers on its said lines.

Third. That Wellsville is a village, duly incorporated under the

laws of this State, in the county of Allegany. That said de-
99 fendant's said lines extend through said village. That said defendant had, prior to the time herein set forth, established a ticket office for the regular sale of tickets to its passengers, for transportation on its said lines, at its station, and in said village, and then maintained the same for such purpose and regularly sold tickets thereat for such transportation.

Fourth. That upon the 28th day of August, 1897, this plaintiff duly made application to said defendant, at its ticket office, in said village of Wellsville, to its ticket agent, therein, acting as such and in charge thereof, for a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of such railroad, and demanded that the defendant issue to the plaintiff such mileage book, required to be kept for sale, thereat, by the provisions of an act, entitled "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, as amended by chapter 484 of the Laws of 1897, entitling the said holder, (plaintiff), or any member of his family or firm, or any salesman of his firm to whom such book is delivered by him, upon surrendering, at any ticket office on the line or lines of such railroad coupons equal in number to the number of miles which he or such member of his family or firm, or such salesman of such firm wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor, entitling the holder thereof to the same rights and privi-
leges in respect to the transportation of person and property
100 to which the highest class ticket issued by such corporation would entitle him. That at the same time, with such application and demand for such mileage book, plaintiff duly tendered to said defendant the sum of twenty dollars, lawful money of the United States, to pay for such mileage book, by handing the same to and offering it to said ticket agent, within said office, at the place so established. That plaintiff was then, and now is, ready and willing to pay said sum for such mileage book. That said defendant, in violation of the provisions of said act, and of its duty thereunder, refused to issue such mileage book to plaintiff and did not and would not issue or offer to issue the same, when requested and demanded. Plaintiff further alleges, upon information and belief, that the said defendant did not keep such mileage books for sale at its said ticket office. All against the form of said statute.

Fifth. That by such refusal to issue such mileage book to plaintiff, on his application, as aforesaid, the said defendant forfeited and became liable to pay to the plaintiff the sum of fifty dollars, which is plaintiff's damages, herein, and to recover which sum this action *is action* is brought.

Sixth. That said sum of fifty dollars remains wholly unpaid.

Seventh. That one year has not elapsed since said cause of action accrued to the plaintiff.

101 Wherefore, the plaintiff demands judgment against the de-

fendant for the sum of fifty dollars and interest from this date, and costs of this action.

Dated August 30th, 1897

A. L. PURDY,
Plaintiff's Attorney.

Office and post-office address, Wellsville, Allegany county, N. Y.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 1.

The above-named defendant not waiving but insisting that the complaint herein does not state facts sufficient to constitute a cause of action against it by Sprague, Moot, Sprague & Brownell, its attorneys, answers the said complaint as follows:

First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is and at the time in said complaint mentioned was operating a railroad in the State of New York
102 more than one hundred miles in length, and that it is authorized by law to charge, and does charge, a maximum fare of more than two cents per mile, but it denies, upon information and belief, that it is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein, except that it admits that it did not, at the time mentioned in said complaint, keep for sale at its ticket office in the village of Wellsville, mileage books of the form mentioned and described in the said complaint.

Fourth. Upon information and belief, it denies each and every allegation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges, upon information and belief that under and by virtue of the laws of the State of New York incorporating and applicable to it and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act entitled, "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896, referred to in said complaint, has no application to it and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and operated by it extends from Jersey City in the State of New Jersey, through the States of New Jersey, Pennsylvania and New York, and
103 in the State of New York connects with lines of railroad leased by it, and operated and substantially owned by it, over

which it transports persons and property to Chicago, with numerous lateral branches extending from the State of New York to different States. And it alleges upon information and belief, that the said act known as chapter 835 of the Laws of 1896 is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the constitution of the State of New York.

Seventh. Further answering said complaint, it alleges upon information and belief, that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for the Defendant, 45 *Erie County Savings Bank Building, Buffalo, N. Y.*

104 Supreme Court, Erie County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 2.

The above-named defendant, not waiving but insisting that the complaint herein does not state facts sufficient to constitute a cause of action against it, by Sprague, Moot, Sprague & Brownell, its attorneys, answers the said complaint as follows:

First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is and at the time in said complaint mentioned was operating a railroad in the State of New York more than one hundred miles in length, and that it is authorized by law to charge, and does charge, a maximum fare of more than two cents per mile; but it denies, upon information and belief, that it is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein, except that it admits that it did not, at the time mentioned in said
105 complaint, keep for sale at its ticket office in the village of Wellsville, mileage books of the form mentioned and described in said complaint.

Fourth. Upon information and belief, it denies each and every al-

legation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges upon information and belief, that under and by virtue of the laws of the State of New York incorporating and applicable to it and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act entitled, "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896, referred to in said complaint, has no application to it, and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and operated by it extends from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania and New York, and in the State of New York connects with lines of railroad leased by it, operated and substantially owned by it, over which it transports persons and property to Chicago, with numerous lateral branches extending from the State of New York to different States. And it alleges, upon information and belief, that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void and
106 because it is in violation of various other provisions of the Constitution of the United States, and of the Constitution of the State of New York.

Seventh. Further answering said complaint, it alleges, upon information and belief, that heretofore and prior to the commencement of this action, the plaintiff commenced other actions against the defendant, to recover a penalty for the alleged violation of said statutes set forth in said complaint; that said actions are still pending undetermined, and that there are other actions pending for the same cause for which this action is brought. It alleges, upon information and belief, that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant.

No. 45 Erie County Savings Bank building, Buffalo, N. Y.

107 Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 3.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 4.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 5.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

108 Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 6.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 7.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 8.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

109 Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 9.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } Action No. 10.

The answer in this action is identical with and in all respects similar to the answer in action No. 2 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 11.

The above-named defendant, not waiving, but insisting that
110 the amended complaint herein does not state facts sufficient to constitute a cause of action against it, by Sprague, Moot, Sprague & Brownell, its attorneys, answers the said amended complaint as follows:

First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is and at the time in said complaint mentioned, was operating a railroad in the State of New York, more than one hundred miles in length, and that it is authorized by law to charge, and does charge a maximum fare of more than two cents per mile; but it denies, upon information and belief that it is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein.

Fourth. Upon information and belief it denies each and every allegation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges upon information and belief that under and by virtue of the laws of the State of New York incorporating and applicable to it, and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act
111 entitled, "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896,

referred to in said complaint, has no application to it, and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and operated by it extends from Jersey City in the State of New Jersey, through the States of New Jersey, Pennsylvania and New York, and in the State of New York connects with lines of railroad leased by it, and operated and substantially owned by it, over which it transports persons and property to Chicago, with numerous lateral branches extending from the State of New York to different States. And it alleges upon information and belief, that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the constitution of the State of New York.

Seventh. Further answering said complaint, it alleges, upon information and belief, that heretofore and prior to the commencement of this action, the plaintiff commenced other actions against the defendant, to recover a penalty for the alleged violation of said statutes set forth in said complaint; that said actions are still pending, undetermined, and that there are other actions pending for the same cause for which this action is brought. It alleges upon in-
112 formation and belief that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant, No. 45 Erie County Savings Bank Building, Buffalo, N. Y.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 12.

The above-named defendant, not waiving, but insisting that the amended complaint herein does not state facts sufficient to constitute a cause of action against it, by Sprague, Moot, Sprague & Brownell, its attorneys, answers the said amended complaint as follows:
113 First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is and at the time in said complaint

mentioned was operating a railroad in the State of New York more than one hundred miles in length, and that it is authorized by law to charge, and does charge, a maximum fare of more than two cents per mile; but it denies, upon information and belief, that it is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein.

Fourth. Upon information and belief it denies each and every allegation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges upon information and belief that under and by virtue of the laws of the State of New York incorporating and applicable to it and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act entitled, "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896, referred to in said complaint, has no application to it, and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and
114 operated by it extends from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania and New York, and in the State of New York connects with lines of railroad leased by it, and operated and substantially owned by it, over which it transports persons and property to Chicago, with numerous lateral branches extending from the State of New York to different States. And it alleges upon information and belief, that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the constitution of the State of New York.

Seventh. Further answering said complaint, it alleges, upon information and belief, that heretofore and prior to the commencement of this action, the plaintiff commenced other actions against the defendant, to recover a penalty for the alleged violation of said statutes set forth in said complaint; that said actions are still pending undetermined, and that there are other actions pending for the same cause for which this action is brought. It alleges upon information and belief that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

115 Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant.

No. 45 Erie County Savings Bank building, Buffalo, N. Y.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 13.

The above-named defendant, not waiving, but insisting that the complaint herein does not state facts sufficient to constitute a cause of action against it, by Sprague, Moot, Sprague & Brownell, its attorneys, answers the said complaint as follows:

First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is and at the time in said complaint mensioned, was operating a railroad in the State of New York, more than one hundred miles in length, and that it is authrized
116 by law to charge, and does charge a maximum fare of more than two cents per mile; but it denies, upon information and belief that it is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein.

Fourth. Upon information and belief it denies each and every allegation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges upon information and belief that under and by virtue of the laws of the State of New York incorporating and applicable to it, and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act entitled "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896, referred to in said complaint, has no application to it, and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and operated by it extends from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania, and New York, and in the State of New York connects with lines of railroad leased by it, and operated and substantially owned by it, over which it transports persons and property to Chicago, with numerous lateral branches
117 extending from the State of New York to different States.

And it alleges upon information and belief, that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and

void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the constitution of the State of New York.

Seventh. Further answering said complaint, it alleges, upon information and belief, that heretofore and prior to the commencement of this action, the plaintiff commenced other actions against the defendant, to recover a penalty for the alleged violation of said statutes set forth in said complaint; that said actions are still pending, undetermined, and that there are other actions pending for the same cause for which this action is brought. It alleges upon information and belief that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant, 45 *Erie County Savings Bank Building, Buffalo, N. Y.*

118 Supreme Court, Allegany County.

ALBERT L. PURDY *against* ERIE RAILROAD COMPANY. } Action No. 14.

The answer in this action is identical with and in all respects similar to the answer in action No. 13 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY *against* ERIE RAILROAD COMPANY. } Action No. 15.

The answer in this action is identical with and in all respects similar to the answer in action No. 13 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY *against* ERIE RAILROAD COMPANY. } Action No. 16.

The answer in this action is identical with and in all respects similar to the answer in action No. 13 above printed and an exact copy of such answer.

119 Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY. } Action No. 17.

The answer in this action is identical with and in all respects similar to the answer in action No. 13 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY. } Action No. 18.

The answer in this action is identical with and in all respects similar to the answer in action No. 13 above printed and an exact copy of such answer.

Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY. } Action No. 19.

The answer in this action is identical with and in all respects similar to the answer in action No 13 above printed and an exact copy of such answer.

120 Justice's Court, Town of Wellsville.

Before H. J. Torrey, Justice.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. A.

The above-named defendant, not waiving, but insisting that the complaint herein does not state facts sufficient to constitute a cause of action against it, and asserting that this court and justice have not jurisdiction in this action, by Sprague, Moot, Sprague & Brownell, its attorneys, answers the said complaint as follows:

First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is, and at the time in said complaint mentioned, was operating a railroad in the State of New York, more than one hundred miles in length, and that it is authorized by law to charge, and does charge a maximum fare of more than two cents per mile; but it denies, upon information and belief, that — is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information
121 sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein.

Fourth. Upon information and belief it denies each and every allegation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges upon information and belief that under and by virtue of the laws of the State of New York incorporating and applicable to it and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act entitled, "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896, referred to in *in* said complaint, has no application to it, and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and operated by it extends from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania and New York, and in the State of New York connects with lines of railroad leased by it, and operated and substantially owned by it, over which it transports persons and property to Chicago, with numerous lateral branches extending from the State of New York to different States. And it alleges upon information and belief, that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitu-
122 tional and void because it is in violation of various other provisions of the Constitution of the United States, and of the constitution of the State of New York.

Seventh. Further answering said complaint, it alleges, upon information and belief, that heretofore and prior to the commencement of this action, the plaintiff commenced other actions against the defendant, to recover a penalty for the alleged violation of said statutes set forth in said complaint; that said actions are still pending undetermined, and that there are other actions pending for the same cause for which this action is brought. It alleges upon information and belief, that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,

Attorneys for Defendant, No. 45 Erie County Savings Bank Building, Buffalo, N. Y.

123 Justice's Court, Town of Wellsville.

Before H. J. Torrey, Justice.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. B.

The above-named defendant, not waiving, but insisting that the complaint herein does not state facts sufficient to constitute a cause of action against it, and asserting that this court and justice have not jurisdiction in this action, by Sprague, Moot, Sprague and Brownell, its attorneys, answers the said complaint as follows:

First. It admits the allegations contained in the paragraphs of said complaint numbered first and third therein.

Second. It admits that it is and at the time in said complaint mentioned was operating a railroad in the State of New York more than one hundred miles in length, and that it is authorized by law to charge, and does charge, a maximum fare of more than two cents per mile; but it denies upon information and belief, that it is not authorized by law to charge a maximum fare of more than three cents per mile.

Third. It denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of said complaint numbered fourth therein.

124 Fourth. Upon information and belief it denies each and allegation contained in the paragraph of said complaint numbered fifth therein.

Fifth. It alleges upon information and belief that under and by virtue of the laws of the State of New York incorporating and applicable to it and its predecessors in interest, it was and is authorized to fix its own rates of fare, and that it is not limited to a maximum fare of not more than three cents per mile, and that the act, entitled "An act in relation to the issue of mileage books by railroad corporations," being chapter 835 of the Laws of 1896, referred to in said complaint, has no application to it, and is of no force or effect as against it.

Sixth. It alleges that the line of the railroad owned and operated by it extends from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania and New York, and in the State of New York connects with lines of railroad leased by it, and operated and substantially owned by it, over which it transports persons and property to Chicago, with numerous lateral branches extending from the State of New York to different States. And it alleges upon information and belief, that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitu-

tion of the United States, and of the constitution of the State of New York.

125 Seventh. Further answering said complaint, it alleges, upon information and belief, that heretofore and prior to the commencement of this action, the plaintiff commenced other actions against the defendant, to recover a penalty for the alleged violation of said statutes set forth in said complaint; that said actions are still pending undetermined, and that there are other actions pending for the same cause for which this action is brought. It alleges upon information and belief that it is not liable to the plaintiff for the penalty sought to be recovered in this action, and that the plaintiff did not demand a mileage book in good faith, but that such demand, if any, was made with the desire and expectation that it would be refused, and for the purpose of suing for a penalty therefor.

Wherefore, defendant demands judgment that the complaint in this action be dismissed, with costs.

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant, No. 45 Erie County Savings Bank Building, Buffalo, N. Y.

126 At a special term of the supreme court of the State of New York, held in and for the county of Erie, at the city and county hall in the city of Buffalo, on the first day of December, 1896.

Present: Hon. Henry A. Childs, justice.

Supreme Court, County of Allegany.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions 2 to 12.

Justice's Court, Town of Wellsville, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action- A and B.

Now, on reading and filing said order to show cause, and the affidavit of George F. Brownell verified herein November 27, 1896, and the affidavit of Albert L. Purdy verified herein November 30, 1896, and upon all the papers in said actions and proceedings heretofore had herein, and after hearing George F. Brownell, Esq., of
127 counsel for defendant, in favor of said motion, and Clarence A. Farnum, Esq., of counsel for plaintiff, in opposition thereto, and on motion of Sprague, Moot, Sprague & Brownell, attorneys for defendant, it is

Ordered, that said motion be, and the same hereby is granted, and that said actions A and B pending in the justice's court, in the town of Wellsville, Allegany county, N. Y., before H. J. Torrey, Esq.,

justice of the peace, be, and the same hereby are removed and transferred from said justice's court to the supreme court in and for Allegany county, and that said above-entitled actions numbered 2 to 12, both inclusive, and said actions A and B so removed and transferred, be, and the same hereby are consolidated into one action.

And the attorneys for the several parties to said actions having stipulated to such effect, it is further ordered, that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in said consolidated action, but that his right to recover upon each alleged cause of action set forth in the several complaints shall be the same as if the said actions had not been consolidated, but had remained separate actions.

It is further ordered that with respect to the recovery and taxation of costs, said several causes of action in said consolidated action shall be treated and considered as separate actions up to the time of said consolidation, and that upon the recovery, or failure to recover upon said causes of actions respectively the successful party shall be entitled to tax his costs up to the first day of December, 1896, the same as if said actions had not been consolidated.

128 And it is further ordered that in case of recovery of costs by each party, said costs may be offset one against the other.

At a special term of the supreme court of the State of New York, held in and for the county of Erie, at the city and county hall, in the city of Buffalo, on the 28th day of April, 1897.

Present: Hon. Alfred Spring, justice.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Consolidated Action.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 13.

Upon consent of the attorneys for the respective parties hereto, and on motion of Sprague, Moot, Sprague & Brownell, defendant's attorneys, it is

129 Ordered, that the above-entitled action, viz: Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, consolidated action, and the action entitled Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, action No. 13, be, and the same hereby are consolidated into one action, subject to all the conditions contained in said order consolidating said actions entered December 3rd, 1896, in Allegany county clerk's office.

And the attorneys for the several parties to said actions having stipulated to such effect, it is further ordered that such consolidation shall not affect the right of the plaintiff to recover more than one

penalty in said consolidated action, but that his right to recover upon each alleged cause of action set forth in the several complaints shall be the same as if the said actions had not been consolidated, but had remained separate actions.

And it is further ordered that in case of recovery of costs by each party, said costs may be offset one against the other, and the stipulation of December 1st, 1896, continued as to such consolidated action. Date of issue of such consolidated action, for placing on calendar to be same as action No. 2.

We hereby consent to the entry of the above order.

Dated April 21, 1897.

A. L. PURDY, *Attorney for Plaintiff.*
SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant.

130 At a special term of the supreme court of the State of New York, held in and for the county of Erie, at the city and county hall, in the city of Buffalo, N. Y., eighth judicial district, on the 27th day of September, 1897.

Present: Hon. Henry A. Childs, justice.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Consolidated Action.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions Nos. 14 to 19, Both Inclusive.

Upon consent of the attorneys for the respective parties hereto, and

On motion of Moot, Sprague, Brownell & Marcy, -fendant's attorneys, it is

Ordered that the above-entitled actions, to wit: "Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, consolidated action," and the actions entitled "Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, actions numbers 14 to 19,
131 both inclusive," be and the same hereby are consolidated into one action, subject to all the conditions contained in the order consolidating said actions, entered December 3d, 1896, in Allegany county clerk's office.

And the attorneys for the respective parties to said actions having stipulated to such effect, it is further

Ordered, that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in said consolidated action, but that his right to recover upon each alleged cause of action set forth in the several complaints shall be the same as if said actions

had not been consolidated but had remained separate actions. And it is

Further ordered, that in case of recovery of costs by each party, said costs may offset one against the other, and the stipulation of December 1st, 1896, continued as to such consolidated action; date of issue of such consolidated action for placing on calendar to be same as action No. 2.

132 At a trial term of the supreme court held at the court-house in the village of Belmont, in and for the county of Allegany, on the 12th day of October, 1897.

Present: Hon. John S. Lambert, justice presiding.

Supreme Court, Allegany County.

ALBERT L. PURDY *ag'st* ERIE RAILROAD COMPANY. } Action No. 1.

Supreme Court, Allegany County.

ALBERT L. PURDY *ag'st* ERIE RAILROAD COMPANY. } Actions No. 2 to 19.

Plaintiff having heretofore commenced an action against defendant known as action No. 1, and defendant herein having duly demurred to plaintiff's complaint, and such demurrer having been overruled by this court at this term, and the defendant thereupon having answered, and it appearing that plaintiff has begun certain other actions known as actions 2 to 19 and A and B which have been consolidated into one action known as the consolidated action pursuant to an order of the supreme court granted on the 27th day of September, 1897, and plaintiff being about to proceed to the trial of these actions, and it being stipulated between the attorneys hereto that said action No. 1 be united with the other actions in

133 the consolidated action upon the same terms as in the orders heretofore granted herein, consolidating the other actions herein; now, on motion of Moot, Sprague, Brownell & Marcy, attorneys for defendant,

It is ordered, that the above-entitled action, to wit: Albert L. Purdy *vs.* Erie Railroad Company, known as action No. 1, and the above-entitled action, to wit, Albert L. Purdy, plaintiff, *vs.* Erie Railroad Company, defendant, consolidated action, be, and the same hereby are, consolidated into one action subject to all the conditions contained in the order consolidating certain of said actions heretofore entered in the Allegany county clerk's office on December 3, 1896.

And it is further ordered that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in the consolidated action, but that his right to recover upon each alleged cause of action set forth in the several complaints shall be the same as if said actions had not been consolidated, but had remained separate actions.

It is further ordered, that in case of recovery of costs by each party said costs may be offset one against the other.

Granted.

J. S. L.
J. S. C.

134 Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY.

This case was brought to trial at Belmont, New York, January 4th, 1898, before Hon. Henry A. Childs, justice, and a jury, when the following proceedings were had and testimony taken:

Appearances.

For the plaintiff: A. L. Purdy, Esq., Hon. Clarence A. Farnum, and C. S. Hall, Esq.

For the defendant: Messrs. Moot, Sprague, Brownell & Marcy, and Mr. Neflany.

Mr. MOOT: Before the plaintiff opens his case, your honor, to raise my question on the record, I make a motion to dismiss each of the actions consolidated in this action, upon the ground that the complaint in each of the actions fails to state facts sufficient to constitute a cause of action for a penalty.

The COURT: I will deny the motion and give you the exception.

Mr. FARNUM: Your honor, we first offer in evidence a certificate of incorporation of the defendant, The Erie Railroad Company, showing said defendant was duly incorporated as alleged in the complaint under the laws of the State of New York, as appears from said certificate filed in the office of the secretary of state, November 14, 1895.

135 Received and marked Exhibit "A."

Certificate referred to shows that the Erie railroad corporation, defendant, was duly organized and incorporated Nov. 14, 1895, under the general laws of the State of New York for the incorporation of railroads.

Mr. FARNUM: We also offer in evidence a stipulation bearing date September 21, 1897, signed by the plaintiff in person and by the attorneys for the defendant in behalf of the defendant.

Received and marked Exhibit "B," which reads as follows:

"Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } 6 Actions—14 to 19, Both Inclusive.

It is hereby stipulated by and between the parties to the above-entitled action, for the purpose of the trial of the issues therein, that

the railroad of the defendant, above named, does not overcome an elevation exceeding three hundred feet to the mile, within the distance of two miles.

Dated September 21, 1897.

A. L. PURDY,
Attorney for Plaintiff in Person, Wellsville, New York.
MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant, Buffalo, New York."

136 Mr. FARNUM: I desire to offer in evidence a stipulation dated December 1st, 1896, signed by the counsel for the plaintiff and by the defendant's attorneys.

Received and marked Exhibit "C," which reads as follows:

"Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions 2 to 12.

Justice's Court, Town of Wellsville.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions A and B.

A motion having been made herein for the consolidation of the above-entitled actions into one action in the supreme court, it *it* is hereby stipulated by and between the attorneys for the respective parties to said actions, that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in said consolidated action, but that his right to recover upon each al-
137 leged cause of action set forth in the several complaints shall be the same as if the said actions had not been consolidated, but had remained separate actions.

Dated Dec. 1, 1896.

A. L. PURDY, *Attorney for Plaintiff,*
By CLARENCE A. FARNUM, *His Counsel.*
SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant."

Mr. FARNUM: I desire to offer in evidence an order bearing date December 1st, 1896, made at the Erie county special term.

Received and marked Exhibit "D," and reading as follows:

138 "At a special term of the supreme court of the State of New York, held in and for the county of Erie, at the city and county hall, in the city of Buffalo, on the first day of December, 1896.

Present: Hon. Henry A. Childs, justice.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions 2 to 12.

Justice Court, Town of Wellsville, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions A and B.

An order to show cause having been made herein returnable on this day, requiring the plaintiff to show cause why, among other things, an order should not be made removing the above-entitled actions brought in the justice's court in the town of Wellsville, Allegany county, N. Y., before H. J. Torrey, Esq., justice of the peace, from said justice's court to the supreme court, and why such order should not further provide for the consolidation of the above-
139 entitled actions 2 to 12, both inclusive, and the above-entitled actions numbered respectively A and B into one action.

Now, on reading and filing said order to show cause, and the affidavit of George F. Brownell verified herein November 27, 1896, and the affidavit of Albert L. Purdy verified herein November 30, 1896, and upon all the papers in said action and proceedings heretofore and herein, and after hearing George F. Brownell, Esq., of counsel for defendant, in favor of said motion, and Clarence A. Farnum, Esq., of counsel for plaintiff, in opposition thereto, and on motion of Sprague, Moot, Sprague & Brownell, attorneys for defendant, it is

Ordered, that said motion be and the same hereby is granted, and that said actions A and B pending in the justice's court, in the town of Wellsville, Allegany county, N. Y., before H. J. Torrey, Esq., justice of the peace, be and the same hereby are removed and transferred from said justice's court to the supreme court in and for Allegany county, and that said above-entitled actions numbered 2 to 12, both inclusive, and said actions A and B so removed and transferred be and the same hereby are consolidated into one action.

And the attorneys for the several parties to said actions having stipulated to such effect, it is further ordered, that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in said consolidated action, but that his right to
140 recover upon each alleged cause of action set forth in the several complaints shall be the same as if the said actions had not been consolidated, but had remained separate actions.

It is further ordered that with respect to the recovery and taxation of costs, said several causes of action in said consolidated action shall be treated and considered as separate actions up to the time of said consolidation, and that upon the recovery, or failure to recover, upon said causes of actions respectively the successful party shall be entitled to tax his costs up to the first day of December, 1896, the same as if said actions had not been consolidated.

And it is further ordered that in case of recovery of costs by each party, said costs may be offset one against the other."

Mr. FARNUM: I desire also to offer in evidence an order dated the 28th day of April, 1897, made at the Erie county special term.

Received and marked Exhibit "E," and reading as follows:

141 "At a special term of the supreme court of the State of New York, held in and for the county of Erie, at the city and county hall in the city of Buffalo, on the 28th day of April, 1897.

Present: Hon. Alfred Spring, justice.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Consolidated Action.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Action No. 13.

Upon consent of the attorneys for the respective parties hereto, and on motion of Sprague, Moot, Sprague & Brownell, defendant's attorneys, it is

Ordered, that the above-entitled action, viz: Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, consolidated action, and the action entitled Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, action No. 13, be, and

142 the same hereby are consolidated into one action, subject to all the conditions contained in said order consolidating said actions entered Dec. 3rd, 1896, in Allegany county clerk's office.

And the attorneys for the several parties to said actions having stipulated to such effect, it is further ordered that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in said consolidated action, but that his right to recover upon each alleged cause of action set forth in the several complaints shall be the same as if the said actions had not been consolidated, but had remained separate actions.

And it is further ordered that in case of recovery of costs by each party, said costs may be offset one against the other, and the stipulation of December 1st, 1896, continued as to such consolidated action. Date of issue of such consolidated action, for placing on calendar to be same as action No. 2.

We hereby consent to the entry of the above order. Dated April 21st, 1897.

A. L. PURDY, *Attorney for Plaintiff.*
SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant."

Mr. FARNUM: I desire also to offer in evidence an order of consolidation, bearing date September 27th, 1897, made at the Erie county special term.

Received and marked Exhibit "F," and reading as follows:

143 "At a special term of the supreme court of the State of New York, held in and for the county of Erie, at the city and county hall in the city of Buffalo, N. Y., eighth judicial district, on the 27th day of September, 1897.

Present: Hon. Henry A. Childs, justice.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Consolidated Action.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Actions Numbers 14 to 19, Both Inclusive.

Upon consent of the attorneys for the respective parties hereto, and

On motion of Moot, Sprague, Brownell & Marcy, defendant's attorneys, it is

Ordered that the above-entitled actions, to wit: 'Albert L. Purdy, plaintiff, against Erie Railroad Company, defendant, consolidated action,' and the actions entitled 'Albert L. Purdy, plaintiff,
144 against Erie Railroad Company, defendant, actions numbers 14 to 19, both inclusive,' be and the same hereby are consolidated into one action, subject to all the conditions contained in the order consolidating said actions, entered December 3d, 1896, in Allegany county clerk's office.

And the attorneys for the respective parties to said actions having stipulated to such effect, it is further

Ordered that such consolidation shall not affect the right of the plaintiff to recover more than one penalty in said consolidated action, but that his right to recover upon each alleged cause of action set forth in the several complaints shall be the same as if said actions had not been consolidated but had remained separate actions.

And it is further ordered that in case of recovery of costs by each party, said costs may be offset one against the other, and the stipulation of December 1st, 1896, continued as to such consolidated action; date of issue of such consolidated action for placing on calendar to be same as action No. 2."

It is conceded by the defendant that action number 1 has been and is consolidated with the other actions upon the same terms and conditions as in stipulation read and orders entered.

MR. FARNUM: We also desire to offer in evidence stipulation bearing date May 7, 1897.

Received and marked Exhibit "G," and reading as follows:

145 "Supreme Court, Allegany.

CLARENCE A. FARNUM
vs.
ERIE RAILROAD COMPANY. } 2 Actions. Trials of Fact.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY. } 14 Actions. Trials of Fact.

It is hereby stipulated by and between the parties to the above-entitled actions, for the purpose of the trial of the issues therein,

First. The railroad of the defendant above named does not overcome an elevation exceeding three hundred feet to the mile, within a distance of two miles.

Dated May 7, 1896.

CLARENCE A. FARNUM,
Attorney for Plaintiff Farnum in Person.
A. L. PURDY,
Attorney for Plaintiff Purdy in Person.
SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant."

146 ALBERT L. PURDY, plaintiff, sworn in his own behalf, testified as follows:

Direct examination by Mr. FARNUM:

I am the plaintiff in this case; I live at Wellsville. There was a time in June, 1896, when I called at the office of the Erie Railway Company in Wellsville, and had a conversation with some one in charge of the office; I think there was a stranger in the office where the tickets were sold. (Paper shown witness.) I cannot give the date when I first had that conversation at the office, without this memorandum. Looking at this, I can tell that I had my conversation in reference to a ticket on June 26, 1896.

I went up to the place where they sell tickets and handed the ticket agent twenty dollars, with a notice like this, and stated to him that I hereby make application for and demand the issue to me or to myself and family, a mileage book, having one thousand coupons attached thereto, for the payment of which I herewith tender the sum of twenty dollars; this application is made for a mileage book, entitling the holder thereof to ride one thousand miles on your road &c. (Witness reads notice.) (Witness shown paper.) At that time I delivered to the person in charge of the office at Wellsville this paper. I have not seen this paper from the day I delivered it until the other trial of this action in October.

Paper referred to offered in evidence.

Received and marked Exhibit "H," and reading as follows:

147 "To the Erie Railway Company:

Take notice that I, Albert L. Purdy, of Wellsville, N. Y., hereby make application for and demand that you issue to me, or to myself and family, a mileage book having one thousand coupons attached thereto, for the payment of which I herewith tender the sum of twenty dollars. This application and demand is made for the mileage book, entitling the holder thereof to travel one thousand miles on the line or lines of your road, required to be issued by you, under chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, of the State of New York.

Dated June 26th, 1897.

A. L. PURDY."

It is conceded that this first action was commenced on the 29th day of June, 1896.

Mr. FARNUM: The complaint shows that that is for the demand made on the 26th of June.

Witness continues: The agent stated to me that they had no books. He said he could get one by making a regular application on their forms, but they kept none in the office, no books in the office. I received no books. He said they hadn't any books for sale, and I did not get any; they did not offer any. After that I called at the office again. I would have to depend upon a memorandum for the day.

(Witness shown paper.)

148 It was the 29th day of June, 1896, I went to the office. I found Mr. Gene McCarthy, the ticket agent at Wellsville, there in the office. I went to the place where they passed out the tickets, at the ticket office at Wellsville, and handed through the window $20.00 in money and a notice the same as this.

(Witness shown paper.)

This is the notice that I delivered to them, left with them. I have not seen that notice from that day up to the time of the trial of this issue in October last. I stated to Mr. McCarthy that I hereby make application for and demand, &c. I read over the paper to him, and left it with him. He took the money and counted out the $20.00 and said that they hadn't any mileage books there on sale, that I could get one by signing the application which he handed to me, and he would send it on and get the book; I do not know that he said when he would send it on; he simply said he would send it on and get the book; it would probably be two or three days before the book would get back, he said. I did not get any book. I came away; he said they did not have any there.

Notice referred to offered and received in evidence and marked Exhibit "I," and reading as follows:

"To the Erie Railroad Company:

Take notice that I, Albert L. Purdy, of Wellsville, N. Y., hereby make application for and demand that you issue, to me, a mileage

book, having one thousand coupons attached thereto, for the payment of which I herewith tender the sum of twenty dollars, lawful money of the United States. This application and demand
149 is made for the mileage book entitling the holder thereof to travel one thousand miles on the line or lines of your road, required to be kept by you, on sale, by chapter 1027 of the Laws of 1895, entitled 'An act in relation to the issue of mileage books by railroad corporations,' as amended by chapter 835 of the Laws of 1896, of the State of New York.

Dated June 29th, 1896.

A. L. PURDY."

It is conceded that the action for which the demand was made the 29th day of June was commenced the 30th of June, 1896.

Witness continues: I called at the ticket office at Wellsville again after that, on the 1st day of July, 1896. I went to the window where they pass out tickets and handed to Mr. Rigdon, who was in the ticket office there at Wellsville, $20.00, and a paper of which this is a copy, and stated to him the contents of the notice, read it over to him; Mr. Rigdon was then the station agent at Wellsville; he was acting as ticket agent. He took the money and counted it. Mr. McCarthy was in the office, too, with Rigdon. Rigdon told Mr. McCarthy to present me with the application to sign; the application was in the form of a contract; I saw it. The contract required that the one purchasing the ticket upon the application should present the mileage book issued upon it to the agent, and get a ticket from the agent, an exchange ticket, giving him the right to an exchange ticket that would be good only upon the day it was issued and for a continuous passage over the road. Mr. Rigdon did not give
150 me any mileage book at that time. He said he hadn't any there; he or Mr. McCarthy told me that, one or the other of them in the office. Mr. McCarthy gave me back the money and said that they hadn't got any books there on sale.

Notice referred to offered and received in evidence and marked Exhibit "I I," and reading as follows:

"To the 'Erie Railroad Company:'

Take notice, that I, Albert L. Purdy, of Wellsville, N. Y., hereby make application for and demand that you issue to me a mileage book, having one thousand coupons attached thereto, for the payment of which I herewith offer and tender to you the sum of twenty dollars, lawful money of the United States and which I am ready and willing to pay therefor.

This application and demand is made for the mileage book entitling the holder thereof to travel one thousand miles on the line or lines of your road, which you are required, by section 1 of chapter 1027 of the Laws of 1895, entitled 'An act in relation to the issue of mileage books by railroad corporations,' as amended by chapter 835 of the Laws of 1896, to keep on sale at this ticket office.

A. L. PURDY.

Dated July 1st, 1896."

(It is conceded that this action was commenced number 3, where the demand was made July 1st, on the 2nd day of July.)

Mr. MOOT: I ask to strike out so much of this testimony as tends to establish any cause of action for selling tickets, not complying with the statute, on the ground that this action is brought not for selling tickets not complying with the statute, but is brought for not selling tickets at all. That there is not a word in the complaint to show that these mileage books do not comply with the law.

151

Motion denied and exception taken.

Mr. MOOT: Then if it may be understood that my position is the same as to the testimony the witness shall give hereafter in the other actions, and that my exception shall apply, then I need not keep raising this point.

The COURT: Certainly.

Witness continues: At the time that I asked for that ticket, one or the other of them in the office told me that they had no mileage books on hand. I called at the office of the defendant, The Erie Railroad Company, after that, on July 3d, 1896. I went up to the place where they sell the tickets and handed a copy of this paper in through the window, with the sum of $20.00.

Witness shown paper.

This is the paper which I delivered to the railroad company; the ticket agent. Mr. McCarthy was in the ticket office, and he took the money and counted it before he handed it back to me, and presented me with a contract or application, told me that I could have the book by signing that contract, and leaving the $20.00 in the course of, I think he said one or two, or two or three days, he said they hadn't got them there, they had to send away for them. He said to me that he did not have any then on hand. He handed me back the money. I left that paper with McCarthy at that time. I never saw it from the time I left it with him until the other trial.

152

Paper referred to offered in evidence.

Received and marked Exhibit "J," and reading as follows:

To the Erie Railroad Company:

Take notice, that I, Albert L. Purdy, of Wellsville, N. Y., hereby make application for and demand that you issue, to me, a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of your railroad, for the payment of which I herewith offer and tender to you the sum of twenty dollars, lawful money of the United States and which I am ready and willing to pay therefor.

This application and demand is made for the mileage book entitling the holder thereof to travel one thousand miles on the line or lines of your road, which you are required to issue and keep on sale

at this office, by section one of chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896.

Dated July 3rd, 1896.

A. L. PURDY.

It is conceded the action, number 4, on that demand made July 3rd, was commenced July 7th, 1896.

Q. You spoke of an application or something, a contract
153 that was presented to you to sign, was that the same in substance as the one that had been presented to you preceding?

A. It was the same form.

I called at the ticket office of the defendant, The Erie Railway Company, at Wellsville, again on July 10; I found Mr. McCarthy there. (Witness shown paper.) I handed him that paper which you now show me, with $20.00 in money, and stated the contents of this to him; I read it over to him. He said they hadn't got any books there for sale; handed me the contract to sign—application or contract, whatever you call it—the same as the others. I refused; I told him I could not sign that, and he said that by signing that and leaving the money there I could get the book in whatever time he fixed—two or three day , I think it was—in the course of a few days. He did not offer me any ticket then, or any mileage book; he said they hadn't got any mileage book for sale there; did not keep them. I did not leave my money; he counted the money and handed it back to me.

Mr. FARNUM: I offer in evidence the paper that was left with Mr. McCarthy.

Received and marked Exhibit "K," which reads as follows:

"To the Erie Railroad Company:

Take notice, that I, Albert L. Purdy, of Wellsville, N. Y., hereby make application for and demand that you issue, to me, a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of
154 your railroad, on mileage exchange ticket, for which such coupons may be surrendered, without producing such mileage book after the issuing of such ticket thereon, to the same rights and privileges to which the highest class ticket issued by you would entitle such holder, such mileage book to be good until all coupons attached thereto are used.

For the purpose of paying for such mileage book I herewith tender and offer to you the sum of twenty dollars lawful money of the United States and which I am ready and willing to pay therefor.

This application and demand is made for the mileage book which you are required to issue and keep on sale at this office by section one of chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896.

Dated July 10th, 1896.

A. L. PURDY."

It is conceded that the action number five, where the demand was made July 10th, was commenced by the service of the summons, July 13.

Witness continues: That application that I speak about that he showed me was in substance the same as the previous one. I called at the office of the defendant again after that, in Wellsville, August 12, 1896. I found Mr. McCarthy in the office. I handed him a copy of this and stated it to him.

(Witness shown paper.)

That is the paper that I handed to him, and handed him $20.00 in money. He took the money and counted it. I also said to him,
"I came up to see if I could get a mileage book, and want
155 one." He held up that copy that I handed to him, and said, "This is your mileage book." After he had counted the money over he handed it back to me. Some time during the conversation he stated to me that they hadn't any mileage books there. I took my money and came away, and got no mileage book.

Mr. FARNUM: I offer in evidence the paper left with the agent. Received and marked Exhibit "L" and which reads as follows:

"To the Erie Railroad Company:

Take notice, that I, Albert L. Purdy of Wellsville, N. Y., hereby make application for, and demand that you issue, to me, a mileage book, having one thousand coupons attached thereto, entitling the holder thereof to travel one thousand miles on the lines of your railroad. For the purpose of paying for such mileage book I herewith tender and offer to you the sum of twenty dollars lawful money of the United States, and which I am ready and willing to pay therefor.

This application and demand is made for the mileage book which you are required to issue and keep on sale at this office by section one of chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896.

Dated Aug. 12th, 1896.

A. L. PURDY."

Witness continues: I never saw that paper from the time I left it with him till the other trial.

156 It is conceded that action number 6, wherein the demand was made August 12, was commenced August 13, by the service of the summons upon the defendant.

I called at the office of the defendant railroad company again on the 15th of August, 1896. Mr. McCarthy was there. I handed him a copy of this paper and stated the contents of it to him. That is the paper I handed to him, with $20.00 in money. He took the money and counted it and he said that they must have coin; I stated to him that those were legal-tender notes that I handed to him, and they were legal-tender notes, and as such I tendered him

the $20.00 for the mileage book. He handed me one of the blank applications. I called his attention then, as I had at other times, to the clause which I deemed objectionable. He said they hadn't any books there on sale in that office, and did not give me any; handed me back the money after he counted it. That is the paper I delivered him at that time and left with him, that you just showed me; I handed that to him and left it with him.

Paper referred to offered in evidence.

Received and marked Exhibit "M," and reading the same as Exhibit "L," except that after the words "Laws of 1895," there is inserted the following: "entitled 'An act in relation to the issue of mileage books by railroad corporations;'" and the notice is dated "August 15, 1896," instead of "August 12, 1896." It is conceded that action number 7, wherein the demand was made August 15, was commenced by the service of the summons on the defendant, August 17.

157 Witness continues: I called at the ticket office of the defendant again in Wellsville, on August 22nd. I found Eugene McCarthy in the office. I handed him a copy of this with the sum of $20.00 in money. (Witness shown paper.) That is the paper I handed him, and left it with him; I stated to him further, that I wanted a mileage book; he took the money and said he would keep it. He presented me with one of the same form of printed applications, and I told him that I objected to some of the provisions of the contract, and he took the contract back, and after he had counted the money handed it back to me, did not give me any book. He said they hadn't any there. I did not get any.

Mr. FARNUM: We offer in evidence that paper left with the agent.

Received and marked Exhibit "N," and which reads the same as Exhibit "M," except that the notice is dated "August 22nd, 1896," instead of "August 15, 1896." It is conceded that action number 8, wherein the demand was made August 22, was commenced on August 24th, by the service of a summons upon the defendant.

Witness continues: I called at the ticket office of the defendant railroad company again, upon the 25th of August. I found Mr. McCarthy there; I handed him a copy of this paper. (Witness shown paper.) That is the paper with the sum of $20.00 in money, and stated to him the contents of it. He took the money and counted it, said he hadn't got any books there, counted the money and handed it back to me. I left with him this paper; did not get any mileage book.

158 Paper referred to offered in evidence.

Received and marked Exhibit "O," and which reads the same as Exhibit "M," except that the notice is dated "August 25, 1896."

It is conceded that action number 9 wherein the demand was made August 25, was commenced by the service of a summons on the defendant, August 26.

Witness continues: I called at the ticket office of the defendant railroad company again on the 27th of August; I found Mr. McCarthy there. I handed him a copy of this and stated to him the contents of it. (Witness shown paper.) That is the paper I handed him and left with him. He took the $20.00 and counted it and he said, "I do not think we have got what you want." He handed me a contract, the same as he had before, the same form. I looked it over and handed it back. I told him that there were provisions in there in conflict with the law, that is, I thought they was, and after counting the money he handed it back to me; he said they hadn't any books on hand; hadn't any books there, and I came away.

Paper referred to offered in evidence.

Received and marked Exhibit "P," and which reads the same as Exhibit "M," except that the notice is dated "August 27, 1896."

It is conceded that action number 10, wherein the demand was made August 27, was commenced by the service of a summons upon the defendant, August 28th.

159 Witness continues: I called at the ticket office of the defendant again on the 31st of August, 1896. I found Mr. McCarthy there; I handed him a copy of this with $20.00 in money, stated the contents of it to him. He handed me out what he called a mileage book, and said if that was satisfactory he would make it out. I asked him if the contract attached must be signed and he said "yes;" I told him the contract was not what was required; that the conditions of the contract did not bring the books within the terms of the law; I told him that I could not sign that contract, and he counted the money and handed the money back to me.

Q. I show you what purports to be a book of the Erie, and ask you if that was a book similar to that?

(Counsel presents book to witness.)

A. Yes, sir; a similar contract. The contract was the same as that.

Mr. FARNUM: We desire to offer that in evidence.

Mr. MOOT: I object, your honor. This presents my question fairly too. I object upon the ground that the complaint in this action in which this book is offered in evidence alleges no book and no defect in any book, but instead alleges that we refused to sell any book at all, and therefore my position is that they cannot bring us here to try a cause of action for not selling any book at all, and ask to recover a penalty from us on that ground, and then come here and admit that we offered to sell them a book, but say that the book does not comply with the law. My position is that when they
160 claim we sell a book which does not comply with the law they must allege that in the complaint, they must point out the defects upon which they may rely as showing a breach of the law, and a right to recover a penalty of us.

The COURT: It seems to me the plaintiff may prove anything that took place at the time of the demand; any answer whatever that

was made by the company which tends to show that the company refused to comply with the statute by furnishing such a book as the statute required them to furnish. Therefore I think this evidence is competent.

Mr. MOOT: Your honor will note me an exception?

The COURT: Certainly.

Mr. FARNUM: I desire to offer that portion of the book only, which contains the contract proper.

Mr. MOOT: I object to that, if the book goes in I must insist it is a part of the transaction and we must have the whole.

The COURT: Yes, you had better put it all in.

Mr. FARNUM: Then we offer the book.

Received and marked Exhibit "Q," and reading as follows:

"Erie Railroad Company.

No. 1895.

New York State.

1,000-mile book.

161 Notice to persons to whom this book is issued.

This book is good only in exchange for transportation wholly within the State of New York.

This book will not be accepted for passage on trains, but must be presented by original purchaser to ticket agent at point of departure, who will issue continuous train ticket to destination.

Read carefully the rules and regulations on inside of back cover and page next preceding same, which must be signed in ink.

.....

Erie
Railroad Company.
New York State
1,000-mile book No. 1895.
Issued to
Mr. C. A. Farnum
of Wellsville, N. Y.

(Whose signature appears on inside of back cover.)

Good in exchange for mileage exchange tickets for 1,000 miles of transportation on the lines of the Erie Railroad Company in the State of New York when officially stamped and presented in accordance with the rules and regulations printed on inside of back cover of this book and on page next preceding same, which rules and regulations are made part hereof.

The coupons contained in this book will only be received for mileage exchange tickets if presented by original purchaser at regular ticket office of the Erie Railroad Company in said State.

162 This book is worthless if it has any alterations by erasure or otherwise.

D. I. ROBERTS,
General Passenger Agent.

Not good unless stamped here by issuing agent.

(Stamped:) Erie R. R. Co.,
Dec. 7, 1896,
Wellsville, N. Y.

Erie.
993—1895—1 mile.
Good only in State of N. Y.

Erie.
994—1895—1 mile.
Good only in State of N. Y.

Erie.
995—1895—1 mile.
Good only in State of N. Y.

Erie.
996—1895—1 mile.
Good only in State of N. Y.

Erie.
997—1895—1 mile.
Good only in State of N. Y.

Erie.
998—1895—1 mile.
Good only in State of N. Y.

163

Erie.
999—1895—1 mile.
Good only in State of N. Y.

Erie.
1,000—1895—1 mile.
Good only in State of N. Y.

Rules and Regulations.

This 1,000-mile book is sold by the Erie Railroad Company and purchased and used by the person named hereon under and in accordance with the following rules and regulations, viz:

1st. It is not good for passage on trains, but the mileage coupons contained herein will be accepted by agent at station ticket office at starting point within the State of New York in exchange for mileage exchange ticket from such starting point to any point in said State at which trains are regularly scheduled to stop, provided that the journey is wholly within the State of New York and that the book is presented by the person named hereon to said agent a reasonable time before departure of the train on which the journey is to be commenced. Ticket agent will detach one coupon for each mile or fraction thereof of distance from starting point to destination.

2nd. The mileage exchange ticket issued by ticket agent in exchange for mileage coupons hereof is subject to all the rules and regulations of this mileage book, and will be good only for a continuous passage on date of issue and wholly within the State
164 of New York, and will not permit stop-over. Said mileage exchange ticket shall only be good for the transportation of the person named thereon, and such person shall be either the original purchaser of this book or a member of his or her family or firm, or a salesman of such firm.

3rd. This mileage book is not valid, nor the coupons attached to it unless book is stamped by selling agent and signed, in ink, by the purchaser, whose signature must be witnessed by said selling agent.

4th. When all the coupons have been detached from this book, the cover hereof will be taken up and retained by the ticket agent issuing mileage exchange ticket for the last mileage coupons. Said ticket agent will forward the cover to auditor of traffic with his report.

5th. This mileage book and the mileage exchange tickets issued hereunder are absolutely non-transferable. If the mileage exchange ticket is presented on the train by any other than the person named thereon or if the person presenting it is not the original purchaser of the mileage book upon which it was issued, or a member of his or her family or firm or a salesman of such firm, it is void and forfeited, and the conductor is hereby authorized by such purchaser to take up such mileage exchange ticket and collect full fare.

6th. Said purchaser agrees to establish his or her identity and the identity of any person for whom a mileage exchange ticket is applied for hereunder, as a member of his or her family or firm
165 or a salesman of such firm, by written signature, or certificate, signed by him or her or other means when required so to do by any ticket agent to whom this book is presented, and further agrees in case of application for mileage exchange ticket for a member or a salesman of his or her firm, to give the ticket agent to whom such application is made, the name and place of business of such firm. The person presenting a mileage exchange ticket issued hereunder shall establish his or her identity as the original purchaser of

this book, or as a member of the family or firm of such original purchaser or as a salesman of such firm, by certificate signed by him or her, or other means, when required so to do by any conductor or baggage agent to whom same is presented.

7th. No extention of time limit of any mileage exchange ticket issued hereunder or refund for unused coupons of this mileage book will be granted.

8th. Coupons of this book will not be received in exchange for a mileage exchange ticket unless they have been detached by the ticket agent.

9th. Mileage exchange tickets issued in exchange for coupons taken from this mileage book will not be issued to any point which is not designated on the time card as a regular stopping place for trains, and will be good for passage only on trains which are advertised to stop at stations named therein and for a continuous passage between such stations.

10th. Baggage will not be checked on this book, but only (subject to this company's baggage rules) on mileage exchange ticket issued in exchange for the mileage coupons hereof.

166 The undersigned purchases and accepts this book subject to the above rules and regulations, which he or she has read and fully understands, and hereby agrees to abide by in all respects.

C. A. FARNUM, *Purchaser.*
C. H. ALLEN, *Witness.*

December 7, 1896."

Witness continues: Mr. McCarthy showed me this book. The agent said that I should sign the book, or sign the contract. After he counted the money he handed it back to me and I came away.

Mr. FARNUM: I offer in evidence the paper which he delivered to Mr. McCarthy on the 31st day of August, 1896.

Received and marked Exhibit "R," and which reads the same as Exhibit "M," except that the notice is dated "August 31st, 1896."

It is conceded that action number 11, wherein the demand is made August 31st, that the summons was personally served on the defendant, October 30, 1896.

Witness continues: On the 7th of November, I called at the ticket office of the defendant in Wellsville; I found Mr. McCarthy there. I handed him, through the window, a copy of this paper.

(Witness shown paper.)

167 That is the paper; I delivered it to him, with $20.00 in money, and stated the contents of it to him. He offered me a mileage book of the same form; that is, opened it up, handed out a mileage book of the same form, opened at the contract; the same form as this just put in evidence, Exhibit "Q."

Mr. MOOT: Your honor, I suppose all these books may be under the same objection and exception in each case without my repeating it continually?

The COURT: Certainly; the stenographer may make a memorandum of that.

WITNESS: I asked him if the contract had got to be signed and he said it had. He counted the money and handed it back to me. I first told him that I could not sign the contract, and left with him this paper.

Paper referred to offered in evidence.

Received and marked Exhibit "S," and which reads the same as Exhibit "M," except that the notice is dated November 7th, 1896.

It is conceded, subject to correction, that action numbered 12, in which the demand was made November 7, was commenced by the service of a summons upon the defendant November 9.

Witness continues: I called at the ticket office of the defendant again upon the 12th day of November. I found Mr. McCarthy, the ticket agent, there in the office. I handed him a copy of this paper with $20.00 in money. (Witness shown paper.) That is the
168 paper I handed to him and left with him, and stated the contents of this to him. He handed out a book opened up at the contract, the same as the other, the same as Exhibit "Q," and said, "Sign that;" I told him that that was not what the law required, and refused to sign it. He took the book back and after counting the money, he handed the money back to me and I came away, and did not get my book.

Mr. FARNUM: We offer in evidence the paper left upon that day.

Received and marked Exhibit "T," and which reads the same as Exhibit "M," except that the notice is dated "November 12, 1896."

It is conceded that the action number "A" commenced in justice's court, wherein the demand was made November 12th, was commenced November 12th, by the service of the summons upon the defendant.

Witness continues: I called at the ticket office of the defendant again on the 14th day of November. I found there some one who was inside of the office that I did not know; he was a stranger to me. I handed in a copy of this paper. (Witness shown paper.) That is the paper which I left with the person in charge, with $20.00 in money, and he took the money and counted it and handed a book opened up at the contract, and told me I would have to sign that; a book the same as "Q." I told him I could not sign that, and he handed me back the money; I did not get a mileage book.

169 Paper referred to offered in evidence.

Received and marked Exhibit "U," and which reads the same as Exhibit "M," except that the notice is dated "November 14, 1896."

It is conceded that action "B," commenced in justice's court, wherein the demand was made on the defendant Nov. 14, was commenced Nov. 14 by service of summons upon the defendant.

Witness continues: I called at the ticket office of the defendant again upon the 17th day of November, 1896. I found Mr. McCarthy, the ticket agent. I handed him a copy of this paper, with

$20.00 in money, and he took the money and counted it and I stated the contents of this to him. He shoved a book through the window, open at the contract, the same as that Exhibit "Q"; I said to him that I declined to sign that contract, to keep the book, and he shoved the money back to me, did not give me any mileage book, and I went away.

Paper referred to offered in evidence.

Received and marked Exhibit "V," and which reads the same as Exhibit "M," except that the notice is dated "November 17, 1896."

It is conceded that action number 13, wherein the demand was made November 17, was commenced March 12, 1897, following.

Witness continues: I called upon the defendant July 28th, 1897. I found Mr. McCarthy in the office. I handed a copy of this
170 paper to him with $20.00 in money, and stated the contents of it; he presented a book open at the contract, the same as "Q," and I told him that I declined to sign the contract; he said it was necessary to sign the contract. He handed me back the money and I came away. (Witness shown paper.) That is the paper that I delivered to him at the time.

Paper referred to offered in evidence.

Received and marked Exhibit "W," and which reads as follows:

To Erie Railroad Company:

Take notice, that I, Albert L. Purdy, of Wellsville, N. Y., hereby make application for and demand that you issue to me a mileage book having one thousand coupons attached thereto, entitling myself, family, etc., to travel one thousand miles on the line or lines of your railroad, as required by chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896, as amended by chapter 484 of the Laws of 1897, upon surrendering the coupons, as provided by said act.

For the purpose of paying for such mileage book I herewith tender the sum of twenty dollars, lawful money of the United States, which I am ready and willing to pay therefor.

Dated July 28th, 1897.

A. L. PURDY.

WITNESS: I did not get my book.

It is conceded that action number 14, wherein the demand
171 was made July 28, 1897, was commenced by the service of a summons upon the defendant July 29, 1897.

WITNESS: On the 31st of July, I called at the office of the defendant again. I found Mr. McCarthy there. I handed him a copy of this paper with $20.00 in money and stated the contents of it to him. He handed me out a book the same as Exhibit "Q," and I asked him if I had got to sign the contract, and he said that I could have it without signing it if I wanted it. I asked him if it would be good without signing it, and I do not think he made me any reply to that. I called his attention to the front of the mileage book, where it said it would not be good unless it was signed, and I do not think he

made any reply to that. I told him that I did not believe I wanted the book, and handed it back to him and he gave me back the money; I came away.

(Witness shown paper.)

That is the paper that I delivered to him at that time. I have not seen that from that time up to the time of the trial of the issue here before.

Paper referred to offered in evidence.

Received and marked Exhibit "X," and which reads the same as Exhibit "W," except that the notice is dated "July 31st, 1897."

It is conceded that action number 15, wherein the demand was made July 31, 1897, was commenced August 2nd, 1897, by the service of a summons upon the defendant.

172 WITNESS: I called at the ticket office of the defendant in Wellsville on August 5th, 1897. I found Mr. McCarthy there; I handed him a copy of this paper. (Witness shown paper.) That is the paper that I handed him, and left with him, with $20.00 in money. He handed me out a mileage book, the same form as Exhibit "Q," and I said to him, "This is not such a book as is required by the statute." He said, "Then I suppose you want back your money." I said, "You have not got such a book as required," and then I asked him if that was all the kind he had, and he said it was. He handed me back the money and I came away.

Paper referred to offered in evidence.

Received and marked Exhibit "Y," and which reads the same as Exhibit "W," except that the notice is dated "August 5, 1897."

WITNESS: I think there was something said about signing the contract, in that interview that I had with him at that time; I think I asked him if I had to sign the contract to get the book, and he said I did.

It is conceded that action number 16, wherein the demand was made August 5, was commenced August 6, by the service of a summons upon the defendant.

WITNESS: I called at the railroad ticket office of the defendant at Wellsville, on August 7th, 1897. I found Mr. Allen there, the station agent. I handed him a copy of this and stated the contents to him and handed him $20.00 in money; he took the money
173 and counted it. He handed me a book the same as Exhibit "Q," open at the contract and asked me to sign it. I asked him if I would have to sign the contract, and he said I would. He said that was all the book they had. After counting the money he handed it back to me and I came away.

Witness shown paper.

That is the paper that I handed Mr. Allen at that time, and left it with him.

Paper referred to offered in evidence.

Received and marked Exhibit "Z." and which reads the same as Exhibit "W," except that in place of the word "therefor," at the end of the notice, the words "for the same" are used, and the notice is dated "August 7, 1897."

It is conceded that action number 17, wherein the demand was made August 7, was commenced August 9, by the service of a summons upon the defendant.

WITNESS: I called at the ticket office of the defendant upon the 11th day of August, 1897. I found Mr. McCarthy there. I handed him a copy of this typewritten paper.

Witness shown paper.

That is a copy of the duplicate. With $20.00 in money and stated the contents of this to him; he handed me a book the same form as Exhibit "Q," and stated to me that that was what I wanted.
174 I started to read the contract and he said he guessed he would not let me read it, and took it back out of my hand. I think that book was a different-colored one. I think that was a blue-covered one, about the same form of contract. I think the form of contract was the same. I think the contract is the same as that, so far as I could observe it. He did not let me read the contract through, I just had it in my hands long enough to glance at, I think, about the first paragraph, and I think there was the same number of paragraphs, and I think they were the same from what I glanced at the face of it.

MR. MOOT: I ask your honor to strike that out.

THE COURT: He says as far as he read, it was the same. That is all there is of his answer.

MR. MOOT: Very well, if your honor so construes it.

WITNESS: He took the book out of my hands. He stated to me that that book was good for a ride on a ticket at any time, and good for a stop-over. He then asked me if I wanted it, and I stated to him that I wanted a book to conform to the statute. I then asked him if he was going to issue me such a book as required. He said, "Wait until this train goes on; will then talk the matter over." When I handed the money in I left it where he could reach it. He did not offer me any book; no, he offered me a book the same as the one before, that "Q," afterwards. I did not wait until after the train left; I stated to him if he had a book to conform to the statute I wanted it. He didn't offer me any book; asked me if I
175 wanted a book made out. I again stated that if it conformed to the statute I wanted it. He didn't hand me any, and the money lay inside where I could reach it and he went away. I took the money and came out; did not get any book.

Paper referred to offered in evidence.

Received and marked Exhibit "A 1," and which reads the same as Exhibit "W," except that the notice is dated "August 11th, 1897."

It is conceded that action 18, wherein the demand was made August

11, was commenced August 13, by the service of a summons on the defendant.

Q. That book that was shown you at that time upon August 11th, did you observe that book far enough to discover whether it had anything about stop-over privileges or not, if so state what you did observe?

A. I think that was the same as that——

Objected to by defendant's counsel.

Q. Did you read it far enough to see?
A. That is the one, the blue cover.
Q. The last one you are speaking of?
The COURT: The last one, he says, was just "Q."
Q. Well, the blue-covered one?
Mr. MOOT: I submit on what the witness states, that he only read the first paragraph, that it is purely speculative and an opinion.
176 The COURT: He asks whether he read it far enough. It may have been in the same paragraph.
Received and exception taken.

A. I do not think I read that far. August 28th, 1897, I called at the ticket office of the defendant in Wellsville. I found Mr. McCarthy there. Mr. Allen was also there, the station agent. I handed him a copy of this with $20.00 in money.

Witness shown paper.

That is the paper I handed him; stated the contents of this. I further stated to him that I wanted a mileage book to conform to the statute. Mr. McCarthy handed me a book, and I stated to him that "what I want is a book to conform to the statute." We talked a few minutes, that I have no memorandum of and I cannot recall what was said, and he handed me back the money and I went away.

The book he offered me was the same as "Q" there, I think; the same as is put in evidence. He took me inside the ticket office at that time and that contract, in addition to what there was there had some matters stamped on the face of the contract making it good to members of the family or firm, and I asked him about what his instructions were in regard to selling that book and he said the instructions on the book were all that he had; my recollection now is that that book was also one of those blue-covered ones. I read the contract in that; I think that was the same as the one in "Q."

Paper referred to offered in evidence.
177 Received and marked Exhibit "B 1," which reads the same as Exhibit "W," except that the notice is dated "August 28th, 1897."

WITNESS: I declined to sign the contract and he handed the money back to me.

It is conceded that action number 19, wherein the demand was made August 28, 1897, was commenced August 31st, 1897, by the service of a summons upon the defendant.

WITNESS: All of these demands which I have testified to as being made by me to the defendant for mileage books were those made in the village of Wellsville, at the ticket office there. I have seen used a mileage book like Exhibit "Q" at the railroad company's office, at Wellsville, and here in Belmont, and Olean.

Q. You may state what the practice is with the railroad company, as you have observed it, in reference to the usage of a mileage book like this Exhibit "Q."

Mr. MOOT: That I object to.

The COURT: Objection sustained.

Q. I would ask you if on the presentation of a mileage book, if anything was issued by the company or any of its officers.

Mr. MOOT: That I object to.

The COURT: I do not see how it is important.

178 Mr. FARNUM: I want to show the form of the mileage slip that they use. We would like to have placed in evidence just what the company do issue.

The COURT: I think I must give you the exception.

A. Yes, sir.

Mr. FARNUM: So that we may bring the matter up I show you a paper and ask you if that is a paper or slip that was issued to you by the ticket agent of the defendant company at Wellsville, New York.

Counsel presents paper to witness.

Mr. MOOT: I object; there is nothing of the kind alleged, and it is not competent to prove it under the complaint as it stands in this action.

The COURT: I suppose the paper you show the witness is such a ticket as the company issues to a person presenting a mileage book at the office.

Mr. FARNUM: That is what we purpose showing.

The COURT: The objection is sustained.

Paper referred to marked Exhibit "C 2" for identification.

Excluded and exception taken by plaintiff's counsel.

WITNESS: I do not recollect independent of the memorandum, what time of day it was when I made the demand for the mileage book upon which action No. 2 is brought. There is a memorandum mark made on it at the time, I can tell from that.

Witness shown paper.

179 That is the memorandum; the memorandum was made at 3.45 in the afternoon. At the time that I made each of these demands and tendered the sums that I say I did, the kind of money that I produced was United States legal-tender notes; that is, the United States notes and Treasury notes, and silver in two or three cases, I think, or partly silver in two or three cases.

Witness shown ticket.

I have seen that ticket before; that was issued to me at Wellsville. I presume that is the one I gave you yesterday.

Q. Did you ever use it for passage?

Objected to by defendant's counsel.

Q. Did you ever use it for passage upon the railway of The Erie Railway Company, defendant?

Mr. MOOT: I object. I assume what counsel now seeks to do is what he sought to do when we were here before, that is to prove the usage of the defendant, or its practice on some other occasion, and this a later occasion in respect to its tickets and its passengers. Nothing of the kind is alleged in his complaint; we came here to try no such issue before and we have come to try no such issue now, and I submit under the complaint as it stands no such issue is before the court, and therefore no evidence upon such an issue is competent.

Mr. FARNUM: I will follow this up, your honor, with proof
180 that *as* the railroad company issued this class of tickets and gave certain rights and privileges to the holder of it from the time we commenced each and every of these actions till the ending.

The COURT: What is the importance of it.

Mr. FARNUM: The importance of it is that the defendant company issue a ticket that gives the passenger different rights of a higher credit and character as to the transportation of that passenger than those they offer us by the issuance of this mileage book.

The COURT: I sustain the objection.

Exception taken.

Ticket referred to offered in evidence.

Excluded and exception taken.

Marked for identification D 1.

Mr. FARNUM: Now, I desire to raise the question that by the amended pleading or by the order that was made in this case at the Erie county special term on the 6th day of December last, that our complaints were amended so that we are entitled to show these matters by the amended complaint.

Mr. MOOT: I say, until they prove that they tendered money or paid money under the order, or by it, the order gives them no relief whatever.

The COURT: I suppose this matter can all go into the record by way of an agreement, and I will state it as I got it from the
181 papers the other day, and if I am not correct about it you can correct it. It is conceded by the parties that after the making and entry of the order directing the amendment of the complaints herein on the 7th day of December, and on the 14th day of December, then instant, the plaintiff procured a draft payable to the order of the attorneys for the defendant, drawn by a solvent bank at Wellsville, New York, upon a solvent bank or moneyed institution in the city of New York—for the sum of $55.75, that being the amount of costs awarded by the order of the court to said defendant's attorneys as a condition of the amendment of said complaints; that said draft reached Mr. Moot, one of the defendant's attorneys,

at his office, in the city of Buffalo, on the 16th day of December, then instant, he having been absent from his office on the 15th. That immediately upon the receipt of said draft, said Moot representing the defendants returned the same by mail to the plaintiff or his attorney with notice enclosed that he declined to accept said draft as money or in payment of the costs so awarded by said order. That thereafter, and on the 18th day of December, and upon the receipt of said communication and draft from said Moot, the plaintiff procured the sum of $56.00 in legal-tender notes of the United States, and transmitted the same by express to said defendant's attorneys at Buffalo, New York. That upon the receipt thereof by said defendant's attorneys, they returned the same to said plaintiff or his attorney, with notice that they declined to receive the same upon the ground that it was not paid within the time provided in the order. That the order was dated on the 6th day of Decem-

182 ber, and entered in the clerk's office of Allegany county on the 7th day of December. That by due course of mail, a letter mailed at the post-office in Wellsville, New York, the point where the letter above referred to was mailed, would reach the party to whom the same was directed, in the city of Buffalo, on the morning or afternoon of the next day. That the note enclosed with the draft by Mr. Moot to the plaintiff was dated December 16th; that the envelope enclosing the same was postmarked Buffalo, December 17, 4 p. m. That by due course of mail a letter mailed in Buffalo at the general post-office would reach Wellsville, the residence of the plaintiff and his attorneys, during the day succeeding such mailing.

Mr. FARNUM: Now, with these concessions I reoffer first the mileage slip.

The COURT: I will give you a ruling on this question, that is what you need, I suppose, to raise this if you want to raise it ever.

Upon the concessions of the parties, the court holds and decides that the order of December 6th, 1897, never became operative, and the complaints amended as therein provided upon the ground that the costs imposed by the order were not paid by the plaintiff within the time limited by the order, and that by the terms thereof, therefore, the motion for an amendment of the complaints was denied.

Mr. FARNUM: To which the plaintiff desires to except.

Cross-examination by Mr. MOOT:

183 Q. Mr. Purdy, how long have you been a lawyer?

A. I was admitted and signed the rolls in Buffalo in June, 1861. I have practiced in Richburg, Allentown, and Wellsville. In Richburg about a year and a half, in Allentown about two years, in Wellsville since about the 1st of December, 1884. I am forty-four years old. Before I was admitted to practice law, I was born on a farm, worked at farming.

Q. Do you mean to say you were farming before you began to practice law or study law?

A. No; not entirely. I worked at lumbering some; also running a store for a couple of years, or a year and a half, at Grant station, west of Jamestown. That is about all I have done, I think. My first practice as a lawyer, to amount to anything, was in Richburg, my next in Allentown, and the last in Wellsville. Aside from practicing law in Richburg, I was police justice there, and interested in oil wells some. I was police justice there a year or a little over, somewhere about that. I do not think of any office I have ever filled since, excepting inspector of election and notary public. I have traveled over the Erie railroad line; I could not tell you to what extent. I have been as far east as New York city over the Erie line; I have been as far west over those lines as Meadville, Oil City; I don't know which is the farthest west. I have traveled on the Erie lines enough to know that they run through New Jersey and Pennsylvania as well as New York.

Mr. FARNUM: We concede that fact that the line runs through the sister States.

Witness shown map.

184 The Erie lines I refer to are the Erie lines, as far as I have traveled on them, described, indicated, on this map you show me.

Map referred to offered in evidence by defendant's counsel.

(Received and marked Exhibit No. 1.)

(A copy of said Exhibit No. 1 is to be printed as a part of this case.)

WITNESS: Nobody is interested with me in these actions. I brought them entirely on my own hook and my own responsibility. I have never made any agreement or arrangement to divide what I may recover in them with anybody; I never talked any such thing with any one. I don't know whether or not I had a mileage book the first year that I went into Wellsville and began these operations, when I made the first tender, as I claim.

Q. Had you ever owned any up to that time?

A. Yes, sir. I don't know how many; more than four; five.

Q. Six?

A. Well, I think so, but I wouldn't be certain about that.

Q. Well, we have got to about the limit.

A. I do not know whether we have got to the limit or not. I do not know how much of the last mileage book I had left when I made the first tender in this action; I do not know that I had any; I haven't any recollection upon that point. I cannot remember whether I had any or not. I do not know where I was going when I
185 made this first tender. I do not know whether I intended to go anywhere at that time. I do not know whether I bought a ticket and went anywhere that day. I took my money and went back. I do not know whether I went anywhere that day except to my office. I do not know whether I went out of Wellsville that day or not. I cannot remember whether I traveled on the Erie road that day or not. I have no recollection of having done so.

Q. You have no recollection of having intended to do so when you made your tender, have you?

A. I have no recollection of intending to do so that day.

Q. And is that answer true as to each of these other tenders that you have testified about?

A. Well, I recollect that there was some time or times that I came here to Belmont upon the day that I made the tender, but that time or times I do not recollect.

Q. In giving your testimony you speak each time as I observe it, of taking your money and going back to your office?

A. No, sir. I did not mention anywhere in the testimony I gave that I took the train and went anywhere.

Q. Can you remember that you did take a train and go anywhere on a single occasion that you made one of these tenders?

A. Not at the time of making the tender.

Q. Can you remember that on the day of making the tender, on a single one of these occasions, you took the train and went anywhere?

A. Yes. I cannot state which day it was. I went here to Belmont.

186 Q. That was one occasion?

A. I think there were more than one occasion. I would not be certain of more than one; I will be certain of one occasion when I went to Belmont. There was one day on which I made a tender that I came to Belmont; I think it was after the making of the tender. I could not say whether I came on a mileage book I already owned or on a ticket that I purchased. After making these tenders I did go there and buy and accept a mileage book; I purchased a mileage book; that was a mileage book in the form of Exhibit "Q." I signed the contract to get that book. I used that book. I could not tell you how many books like Exhibit "Q" I bought and signed the contract for and used, after making this first tender; more than one. I did not use them all up except in one case, but I purchased more than one. I transferred my book to some other person, after I had used some out of it. I could not tell you how many books like Exhibit "Q" I bought that I transferred to other people; more than one; two.

Q. Three?

A. I think so, but I would not be certain of it. As near as I can remember I bought three that I used some of and then transferred to other people.

Q. How many did you buy like Exhibit "Q" that you used yourself without transferring to other people?

A. I used a portion of all of them. I did not buy any that I did not use in part. I bought just one that I used in whole or in part that I did not transfer to anybody. I think there is a cover and a few leaves in it left. I think that was the one put in evidence here.

187 Q. Exhibit "Q"?

Mr. FARNUM: I do not think Exhibit "Q" was the one.

Q. I will help out a little, here is Exhibit "Q," which seems to have been issued to Mr. Farnum.

A. No, sir; that is not mine. That was not issued to me.

Q. I show you one here issued to yourself June 3, 1897. Is that the one you have in mind?

Counsel presents paper to witness.

A. Yes, sir; that I used and did not transfer to others; I did not transfer that to any one. All these books that I bought and used or transferred to others, I signed the contract in the book, and did as they requested me to do in these cases where I made tenders. The conditions I would not comply with in cases where I made tenders I did comply with in cases where I purchased books. I do not remember what this money was that I made my tender with, in any particular case. I never made my tenders in gold; it was always in bills or silver. Some of it was what we call greenbacks. None of it was coin notes. There was none of it in gold certificates or silver certificates or national bank notes; I did not keep the tender good in any case; that is, I did not leave any money there. I kept the money so that I would have had it to give if they had sent me word that the book was ready the next day or the day after; I had the money the next day or the day after. I do not think I used the same money in making the tender from day to day. I will swear
188 that I did not wholly. I will swear that I did not use the same $20.00 where I made a tender two days in succession in making that tender; because I got it out of the bank each time and I do not think it was the same money. I went to the bank each time and got the money and made a tender, and then went and returned it after I made the tender. I did not borrow the money of the bank to make the tender; drew it out of the bank to make the tender. I had an account there in the bank.

Q. Your account was good for the $20.00 at all time?

A. Well, it was good for $20.00 whenever I got it. I had the money there.

Q. Yes, but how did you get the maney there, borrow it?

A. No, sir. I have some memorandums here from which I testify. In some cases they throw some light on the tenders, except that the tender was made. I do not think I read all that there was on those memorandums while I was testifying yesterday, not in all of them. I think I omitted some of my memorandum in giving my testimony; I think not in each instance. The memorandum that I was testifying from yesterday was made on the copies of the papers, the paper that I handed to the ticket agent with the money, the copy that my counsel and I had while the testimony was being given. I could not have given that testimony without this memoranda. In the main, I cannot recall the facts without those memoranda. I made that memorandum at the time that I made the demand; within a minute or two afterward, or five minutes. I made the memoranda in the waiting-room of the depot, immediately
189 after I got through talking with the agent; before I left the depot, in every case except two or three cases; and those I made within five minutes after we had finished.

Memoranda referred to produced by plaintiff's counsel.

This memorandum for action one is in ink. I had a fountain pen there to write it down.

Q. I see that the words "or to myself and family" in the notices are written in in ink, and that there has been an erasure down below "Laws of 1895." Can you explain those?

A. That I do not know. I do not remember about those. Whatever there is on this paper, including the date and my signature above, appears upon the one left with the agent.

Witness shown Exhibit "I."

There is no erasure or hyphen there indicating that there had been anything else in that. I have no family except my father and sister. I help take care of them; it is the only family I have. They do not live with me.

Q. They cannot be called your family in the sense in which we ordinarily use the word.

A. Well, I have to support them. They are a hundred miles or more away from me. As to whether I would hardly call my father and sister, living a hundred miles away, by themselves, a part of my family, that really would be a question. I consider them so. I live alone at Wellsville, and have all these years, except three
190 years they were there. It is about ten or eleven years, I think, since my father and sister have been with me at Wellsville.

Q. Then, in all fairness, do you not think we might say that you have no family except yourself?

A. Well, I considered them a part of my family, but then, they may not be. I do not make any contention on that point, whatever. In action number two, all that there is in the way of memoranda on that notice, as it reads there, is, "Made demand and application at 3 o'clock and 45 minutes, p. m., Eugene McCarthy in the ticket office." Anything more than that is outside of any memoranda. In number three, my memoranda on that is: "Made demand at 11 o'clock 15–20 minutes a. m." That indicates it was fifteen to twenty minutes. "July 1st, 1896, McCarthy, ticket agent, and Rigdon, station agent, present. Shoved $20.00 through slot and asked for mileage book, and handed through copy of this paper; taken by McCarthy with money, and Rigdon says, 'Present him with application to sign.' The application was contract with numerous restrictions." I think that is what it is meant for. "McCarthy gave me back money. I says, I understand you have no books on sale. That is what I want. Such as required by the law to be kept on sale. Rigdon says, We have no books except the one this application calls for. You can sign the application, leave your money and get the book."

Q. That is a faithful memorandum of what occurred, as near as you could make it, at the time?

A. Well, it might not have been all. As a lawyer, I put down everything that happened that I thought was material at the time.

That was why I made these memoranda. I was a lawyer,
191 and I knew that my memory might fail and it was best to have a memorandum of what I considered material. So I made a memorandum of all that happened that I thought was material to my case.

Q. You went there for the purpose of starting these lawsuits from time to time?

A. I went there for the purpose of getting a mileage book.

Q. Or starting a lawsuit; that is so, is it not?

A. Well, if the mileage book was not given to me that I wanted. I intended to start a lawsuit every time if they did not give me a mileage book such as I demanded. That is true every time I went there; that is why I made these memoranda. And so I put down on these memoranda everything that occurred that I thought was material to my side of the case.

In action number 4, my memoranda made at that time, just as it is there, is,—"Made demand for book at 10 o'clock and 25 minutes, a. m. Eugene McCarthy, agent. Presented contract or application; marked objectionable paragraphs. He said they would have to send away for book. Said did not keep books." Well, there is a stunner.

Q. "Would claim" is it not?

A. No.

Q. Well, you may read that word blank, and we will fill it in.

A. "Subject to regulations and mileage book, I asked to see mileage book so could tell what these regulations was. He gave me back money and went to the telegraph instrument to work." I cannot tell what that one word is, I may after considering a while."

192 On number 5, my memorandum is: "8 o'clock and 45 minutes a. m., demand of McCarthy in office; copy of this; two $10.00 bills, one United States note" another word I cannot make out, March 3.

Q. Act of March 3?

A. Yes, sir; "act of March 3, 1862, series of 80, one United States Treasury note; both legal tender. Said they were all tendering gold for the books now. This is not gold."

All of my memorandum on number six is,—"$10.00, series of 1880 A. 11926800; ten dollars series of 1880 A 16668704; Eugene McCarthy in office 8.45 a. m.; handed him application of which above is copy, and two ten-dollar legal-tender greenbacks above numbers. Shoved through ticket slot in glass door. He said leave the application and get out and I will file it. I said, I came up to see if I could get mileage book. I want one; he held up application which I had just handed to him, and said, 'This is your mileage book.'"

My entire memorandum on number seven is:—"Gene McCarthy 3.50 p. m. in ticket office. Handed him copy of above paper. Shoved money through window. Two ten-dollar bills, greenbacks A 11926800 series of 1880: A 16668704, series of 80, McCarthy said they must have coin. I stated that these were legal tender, and as such I tendered him the $20.00 for mileage book. He handed me one of their

blank applications. I called his attention to the clauses which were objectionable. He said they had no books on sale."

Q. Now, I observe in reading the numbers of the bills you made a mistake on the number six; just look, compare those two
193 numbers and see if the numbers of those two bills are not identical, showing that you made the tenders in number six and number seven with the identical money?

A. Yes, sir; they are.

That did happen at least once.

My entire memorandum on number 8 is,—"3 o'clock and 45 minutes p. m. Handed copy of above to Eugene McCarthy, ticket agent, Wellsville, New York, asking for mileage book. McCarthy took the money presented at the same time and said he would keep it this time, $20.00. I said to him, 'I want the mileage book required by the law.' He presented printed application. I said to him that I objected to some of the provisions of contract; he took contract back; handed me back money; stamped copy above. Five-dollars United States notes, number A 3134982; five-dollar United States note number A 32311942; five-dollar legal tender number B 3959183. Five-dollar legal tender B 3548264. The first two were legal tender series of 1880 and the next two were Treasury notes series of 1891."

My entire memorandum on number 9 is:—"McCarthy, ticket agent, 9.35 a. m.; called for mileage book, and offered and presented $20.00; four five-dollar Treasury notes, two greenbacks. Took copy of above notice and said will have mileage book September 1st. Take your things and get off. C. S. Hall present. Going to Hornellsville fair."

My entire memorandum on number 10 is:—"Eugene McCarthy in ticket office. $20.00; four five-dollar bills. Legal tender, shoved money through slot, and handed him copy of above and said, I wanted mileage book; I do not think we have got what you
194 want, but handed me contract same as before. I looked it over and there were some provisions in conflict with law. I handed it back; he then handed me back the money. I said: 'Then I understand you have not got books?' Three Treasury notes, $5.00 each. One greenback $5.00. Riley of Buckville and Will C. Frederick present."

Q. As you tendered five-dollar bills the numbers which are given on number 8 memorandum, and the number of which are not given in number nine and number ten, although they state that you tendered four five-dollar bills, wouldn't it be your best recollection that the same four $5.00 bills were tendered in number nine and number ten that were tendered in number eight?

A. I do not think they were. Notwithstanding the fact, I found that I tendered the same ten-dollar bills in two different cases on previous occasions. There was no reason why I was afraid to tender the same money again. I do not know of any reason why I should get different money except I was changing it around.

My memorandum on number 11 is:—"6 o'clock, 50 minutes, p. m. He took my application; it was $20.00; two Treasury notes, $10.00 each, McCarthy handed me mileage book and said if it was satisfac-

tory he would make it out. I asked him if the contract attached must be signed, and he said 'Yes.' I told him the contract was not what was required, and that the conditions of the contract did not bring book within the terms of the law."

My memorandum on number 12 is:—"November 2, made application, Gene McCarthy, 1.10 p. m. $20.00. Shoved through slot.

195 Five-dollar United States notes; A 31337560; A 19497276; A 30414542; A 23235801; offered me mileage book with contract which I refused to sign. He then handed me back money."

All of my memorandum in action number "A," justice's court, is, "Stated I wanted mileage book, complying with chapter 835, Laws of 1896; offered $20.00 at 10.25 a. m., legal tender; four five-dollar bills; Eugene McCarthy, agent in office; handed me book open at contract." "And handed me pen and said sign that. I said that was not what the law required."

My memorandum in action "B" is: "Made demand at 1.25 p. m., tendered $20.00; four United States notes; fifteen dollars and five silver dollars. Stranger apparently selling tickets. Said to him, wanted mileage book, repeating above application, and Allen, station agent, was in office. He brought out book with contract." I think that is meant: "I asked—said I would have to sign contract. I said I do not feel like signing that contract. Higbee Dukes present; Harry Lake and others. He shoved me back the money."

All of my original memorandum in action number 14 is: "July 28th, made demand, McCarthy. Read above, 10.40 a. m. Read above notice. Gave one to him; offered two United States notes; ten dollars each. He presented me book. I declined to sign contract which he said it was necessary to sign. Some changes from former. Gave me back other money; four five-dollar bills. McCarthy. Read chapter 484, Laws of 1897, which I had with me."

I have read the entire memoranda now.

196 Q. The words "some changes from former" have reference to the book that was tendered to you which had changes in it from the former book, do they?

A. Well, I do not think there were any changes.

Q. I will ask you if the words "some changes from former" have reference to the book that they offered you?

A. Well that was intended for it; at the time of it, yes, sir; on his statement. They follow the words: "He presented me book; I declined to sign contract which he said it was necessary to sign. Some changes from former." He stated to me that there were some changes in the contract. I do not think that was the time he showed me the blue book; however it may be. I think he did show me the blue book at that time; that would be my best recollection. I think I did not read the blue book that he showed me; that is, I do not think I read it clear through. I simply took his statement for it, that this blue book that he showed me was different from the other book, there were some changes in it. I subsequently read it clear though; one of the same kind. It was different from "Q" in that it had stamped on the face of it with rubber stamp some words, otherwise I do not think it was different; that is the substance of it

was not, anyway. It had stamped across the face of it directions that slightly affected the conditions on the inside. I think the words were "Good for any member of the family or firm;" I think nothing else. I do not remember anything else; that is on the last one; it was not then, anyway. I never compared it with "Q" to see whether they were the same. I read "Q" over a number of
197 times. I know we cannot tell whether papers are identical without comparing them. Not having compared it, I could not say whether it was the same as "Q" or not, in detail; but the general substance of it was the same. That is my opinion as a lawyer.

My entire memoranda on number 15 is—"July 31; demand 4.05 p. m.; McCarthy, ticket agent office. Four five-dollar bills, legal tender, mileage book; offered me book without signing by me if I wanted." That is all there is on that.

My memoranda on number 16 is—"Made demand at 4 o'clock and 49 minutes p. m.; McCarthy handed out book. I said to him 'This is not such a book as required by statute.' He said, 'Then I suppose you want back your money?' I said, 'If you — not got such book as required,' and asked him if that was all the kind he had."

My entire memoranda on number 17 is—"3.55 p. m. C. H. Allen, ticket agent, in office; asked for such mileage as required to be issued by chapter 1027, Laws 1895; as amended; handed him $20.00 Treasury notes and United States notes. He handed me back mileage book with contract to be signed; I asked him if I would have to sign contract, he said I would. He said that was all the book they had. Same book as before, same contract."

All of my memorandum on number 18 is—"5.30 p. m. Offered $20.00. McCarthy in office. Handed me book; stated it was what I wanted. I started to read; he said he guessed he would not let me read and took it back out of my hand. The money lay inside of ticket slot. McCarthy said the book is good for ride on ticket at any time and good for stop-over; he then asked me if I wanted
198 it. I stated to him that I wanted a book to conform to the statute. I then asked him if he was going to issue me such book as required. He said, 'Wait until the train goes; we will then talk the matter over.' The money was where he could take it. He offered me book same as before, besides the one he claimed conformed to statute, the one claimed to conform to statute was not the same as one before apparently, but contained a lot of printed matter and something stamped over it. Before taking back the money I stated to him that if he had a book to conform to the statute I wanted it. He did not offer me any book. Asked me if I wanted it made out. I again stated that if it conformed to the statute I wanted it." That is the entire memoranda there. In this memorandum I said that he offered me two books; I say "one claimed to conform to statute was not same as one before apparently, but contained a lot of printed matter and something stamped on it."

Q. That was the way that it appeared at that time?

A. No, it did not——

Q. Is not that the way that it appeared at that time?

A. It did not appear to me because I only read——

Q. That is what you say?

A. That is what I say there; yes. I did not write down entirely the way it looked to me, I took his word for it.

Q. Well, above her, you say "I took them to read."

A. I took them to read; yes, sir. After I had read some, he took it away from me; so far as I had read, it was the same as the other.

199 Q. Then having read some part of it he taking it away from you, you write down "the one claimed to conform to statute was not same as one before, apparently"?

A. I have his word for it. "It contained a lot of printed matter and something stamped on it;" I wrote that down there. There is not anything there showing I took his word for it, or showing he gave his word about it. I subsequently, however, found it was the same. I never compared it. As a lawyer, I can swear the substance of it was the same.

Q. You cannot swear as a lawyer the substance of it was the same if you cannot swear it was the same, can you?

A. Yes, sir. I want to swear that without comparing anything, without knowing how it compares, I can swear the substance is the same. My entire memoranda on number 19 is:

"1.35 a. 1.47 p. m."—that means from 1.35 to 1.47 "—made application for mileage book; tendered $20.00; two ten dollars; one Treasury note, one United States note. Eugene McCarthy in office. Allen also present. I said I wanted mileage book to conform to statute. I was handed book by McCarthy same as before. I said what I want is book to conform to statute. Talked 12 minutes and he at the end handed me back the money. During the time he had called me into the ticket office to show me his instructions under date of May 22, 1897, relative to issuing tickets to members of families or firms on New York State mileage book coupons. He said this was all the instructions he had. George H. Blackman present."

I have read to you my memoranda in each case, and all the
200 memoranda I have in each case, from which I have testified. From the memoranda I have read I gave the testimony I did yesterday in answer to my counsel.

Q. Are you able to testify positively to anything not appearing in that memoranda?

A. Yes, sir. I do not think I told my counsel yesterday that I could not testify positively to anything not appearing in my memoranda, as a reason why I should be allowed to testify from my memoranda. I do not know what his question was in that regard.

Q. You did not have any conversation at any time with any of these gentlemen in the ticket office of the defendant about the lines of the Erie Railway Company outside of the State of New York, did you?

A. I do not recall anything now, might have been.

Q. Did you at any time change your demand or your notice to them for a mileage book, your written one?

The COURT: The notices show: they do not claim anything except on the written notices.

Mr. MOOT: That is correct, is it?

Mr. FARNUM: Yes, we claim on the written notices accompanied by the demand.

WITNESS: I do not claim that I made any other or different demand for a book, at any time, than the written one, except as it appears in the testimony. I claim that the demand was made just as given and stated in the written demand, by me. In speaking about my family I said nothing about a wife; I am not a married man.

Q. Is that perfectly clear, or has that been a subject of dispute between you and a woman?

201 A. I never was married and never lived with any woman as a wife, there has never been any dispute on the subject, whatever. No woman has ever claimed that she married me; there never has been any such claim made that I ever heard of. There may have been, and I not heard of it, of course. When I was police justice at Richburg, I imposed fines from time to time. I have not assigned the causes of action, or any or them, here in this case, to anybody.

Mr. MOOT: As a part of this cross-examination connected with the Erie lines, part of this map, to make the description of the lines of the defendant more certain, I want to put in evidence and it is in Liber 164 of Deeds, page 60 and page 73, the first being a deed from Arthur H. Masten, special master, &c., and Charles H. Castor, of the old New York, Lake Erie & Western lines, on a foreclosure, and the second being a deed from Charles Castor and others to whom that deed was make, to the defendant Erie Railway Company of the same lines. These deeds delivered and recorded in November, 1895. These deeds show the defendant The Erie Railroad Company owns and operates a continuous line or lines of railway from Jersey City in the State of New Jersey through the States of New Jersey, Pennsylvania, New York, Ohio, Indiana and Illinois, to Chicago as also appears from the map in evidence in this case.

Redirect examination by Mr. FARNUM:

There was other conversation had between Mr. McCarthy or the other ticket agents and me, at the times that I made these
202 memoranda, that I did not put on my memoranda. I put on such as I deemed important.

Q. Now, you mentioned there that this last ticket that was shown you was similar to one before, what do you mean by that?

A. The contract in the back part of it. I read that to some extent.

Q. Now, you said that you could tell the substance or the certain portions of a contract, of, I think that was number 18, you say that you knew what they were, how did you know that? You stated that they contained certain objectionable features. Counsel asked you how you knew that if you did not read it through.

A. I read it through at the time this demand was made, when 19,

I think, the last one or next to the last one, whatever it was, when he called on me on the inside. That 19 had the same appearance as 18 which was shown me before. Up to the time the 11th action was commenced, the ticket agent did not at any time offer me a mileage book when I made my demand.

JOSEPH DEMMER, sworn for the plaintiff, testified as follows:

Direct examination by Mr. FARNUM:

I live in Belmont. I am the ticket agent and station agent of The Erie Railroad Company, this defendant, and have been such ever since 1860. I have been the station agent of the predecessor of the present Erie since 1860, and I have been the agent here ever
203 since 1860. I have sold passage tickets for the defendant company during that time; have recently and do now. The distance from Belmont to Wellsville as given me by the railroad company is eight and a fraction, I cannot remember just exactly; call it nine. I have sold tickets ever since the Erie Company as such was organized up to the present time, and sold from Belmont to Wellsville.

Q. What is the rate of fare charged for the regular ticket?

Mr. MOOT: I object to that. I do not quite see the purpose of this.

Mr. FARNUM: The point is this, the statute is that railroads which charge a maximum fare of more than two cents and are not entitled to receive to exceed three cents a mile are within the mileage book act, and I want to show by this officer that they do charge more than two cents a mile.

The COURT: Yes, you may prove that. I suppose that will be conceded.

Mr. MOOT: I concede that we charge more than two cents a mile between here and Wellsville.

The COURT: It is conceded that this company charges for passage on its road more than two cents per mile for each passenger.

Mr. MOOT: Not quite so broad as that; but I will concede that the defendant has charged and does charge more than two cents a mile within the State of New York, for passengers to whom it sells tickets; some of the passengers to whom it sells tickets.

204 Mr. FARNUM: I do not care about outside of the State.

The COURT: Are you satisfied with defendant's admission?

Mr. FARNUM: I want to show that the ordinary ticket that is kept on sale by the defendant company for sale at points within this State is more than two cents a mile.

The COURT: You may show it.

Mr. FARNUM: Do you concede that, Mr. Moot?

Mr. MOOT: I will not concede that, because it does not happen to be the fact. It depends on the locality; in some places we charge three cents a mile and in some places only two or less than two; it depends on the competition and locality.

Q. You say the distance is eight miles and a fraction from Bel-

mont to Wellsville; what is the regular rate of fare charged by your company for the sale of its regular tickets?

A. Twenty-five cents; what we would call our regular tickets. The distance from Belmont to Andover is seventeen miles. The rate of fare charged upon our regular ticket that we sell from Belmont to Andover is fifty cents. The distance from Belmont to Hornellsville is thirty-five miles. The regular rate of fare that we charge upon our tickets from Belmont to Hornellsville is $1.05. The distance from Belmont to Olean is twenty-five miles, I think; and our rate of fare charged by the railroad company for our regular ticket that we sell is ninety cents. As to the distance to Salamanca, now
205 you are coming as far as that, I do not sell that every day; I think forty-seven miles, I am not certain. I could state if I had one of our time-cards or time-tables.

(Witness shown paper.)

Belmont 366; Salamanca 414; that would be forty-eight miles from Belmont to Salamanca; the rate charged for the passage from Belmont to Salamanca is $1.50. The distance from Belmont to Dunkirk is ninety-three miles; the rate of fare regularly charged by our railroad company for that distance is $2.85. The distance from Belmont to Elmira is ninety-three or ninety-four miles; the rate of fare charged for that is $2.50. In each one of these cases I have mentioned the rate of fare exceeds two cents a mile, I should think. Those rates which I have charged are the rates which I am instructed to charge.

(Witness shown ticket.)

I think this ticket which you show me marked Exhibit D 1, for identification, is one of the regular form of tickets which is used by the defendant company for sale on the line of this road, it looks like it.

Q. And do you use a ticket similar to that for this local fare where tickets are bought from Belmont to the points that you have named in your testimony?

A. I use that kind of ticket and also a ticket from the book. One of this kind of ticket to every station. We have a book, the tickets are in blank, they are a little different. We write in the name of the station. But the rate of fare is the same with that as with this.

206 A. L. PURDY, recalled for the plaintiff, testified as follows:

Direct examination by Mr. FARNUM:

I received this certificate of service shortly after the day it bears date. It was in the condition then it is now. The figures which you show me in it were then as now, at 11.15 a. m.

Mr. FARNUM: I offer the certificate in evidence.

Mr. MOOT: I object. This is an *ex parte* affidavit. I have no chance to cross-examine upon it.

Objection sustained and exception taken.

THOMAS B. HOLMES, sworn for the plaintiff, testified as follows:

Direct examination by Mr. FARNUM:

I am a conductor in the employ of the defendant, The Erie Railroad Company; I have been a conductor upon this railroad thirty-one years. I have been in the employ of the defendant nearly ever since its organization.

(Witness shown ticket.)

The writing in pencil on the back of this ticket marked Exhibit "D 1," for identification, is my handwriting.

Q. What does it read?

Mr. MOOT: Wait a moment, I object.

The COURT: How is it important?

207 Mr. FARNUM: I desire to show the course of dealing and the practice in the use of these tickets in giving stop-over tickets, etc.

The COURT: I have already ruled on that question. I must be consistent, of course. I will give you the exception.

Mr. FARNUM: Exception, please.

Q. I would ask you, Mr. Holmes, so that we may bring the question up, if your instructions require you and your practice would from June, 1896, down to August, 1897, require you to sign such a ticket as that at any time it was presented.

Mr. MOOT: I object to that as outside of the issues.

Sustained and exception taken.

The plaintiff here rested.

Mr. MOOT: I move for a nonsuit in each action separately:

First. Upon the ground that the cause of action alleged in each action has not been proved.

Second. Upon the ground that no cause of action has been proved in either of the actions consolidated in the action on trial.

Third. Upon the ground that the plaintiff only demanded a book good on the entire line or lines of defendant's railway in all the States, and, therefore, the defendant rightfully refused his

208 demands, as defendant was under no obligation to obey the law of New York outside the State of New York. The defendant could only be made liable for a penalty by demanding of it a mileage book good on the line or lines of the defendant's railway in the State of New York, and plaintiff never made such a demand, although a demand for such a book good on the line or lines of defendant's railway in the State of New York is a necessary condition precedent to the maintenance of this action for a penalty.

Fourth. The undisputed evidence shows that the defendant is lawfully engaged in operating a railway line or lines in the States of New Jersey, Pennsylvania, New York, Ohio, Indiana and Illinois, running from Jersey City to Chicago, and there is no evidence to show that the defendant is authorized by law to charge a maximum fare of more than two cents a mile and not more than three cents a

mile, and does charge and did charge a maximum fare of more than two cents a mile, but there is an entire absence of evidence as to the maximum or minimum charges of the defendant in all States outside of New York State, and so far as the State of New York is concerned the undisputed evidence shows a maximum *charge of more* than three cents a mile, and there is no evidence to show that this was not a lawful charge on the part of the defendant, and no evidence to show that the legislation under which the plaintiff seeks to recover penalties herein was intended to or does apply to the line or lines of the defendant.

Fifth. Upon the ground that if the legislation under which
209 the defendant seeks to recover penalties herein was intended to apply to the railway line or lines of defendant and its operation of its railway line or lines, then such legislation of the State of New York and acts of the legislature of the State of New York are void, because they undertake to interfere with or regulate commerce among the several States, contrary to the Constitution of the United States and the acts of Congress in such case made and provided.

The COURT: I am inclined to hold in this case that the regulation of the company, or the rule requiring the holder or purchaser to sign this book was a reasonable one which they might impose and insist upon, and that leads to a granting of this motion for a nonsuit as to the last eleven cases. As to the first ten cases I deny the motion for a new trial.

Mr. FARNUM: We except to the decision or the ruling of the court as to the actions following the first ten.

Mr. MOOT: And we except as to the denial as to the first ten. I will request the court to direct a verdict in favor of the defendant as to the first ten cases. As to the first ten cases I ask to go to the jury and ask a finding from them that the plaintiff only made one *bona fide* application for a ticket as a passenger, on the ground that his own testimony shows that he had no use for more than one; that he went there for the purpose of bringing actions and recovering penalties; that the statute was drawn and intended to reach *bona fide* passengers only, and was not drawn or intended to reach or benefit mere informers seeking to recover penalties of the defendant.

210 The COURT: The court rules that the defendant may go to the jury upon the question of the veracity of the plaintiff, who has testified in his own behalf, but holds that if the jury shall believe what the plaintiff has testified to that he is entitled to recover the ten penalties, or a penalty in each of the first ten cases on trial.

Mr. MOOT: To which ruling I except. And I understand each ruling and exception to apply to each case separately.

The COURT: Certainly.

Mr. MOOT: Now, I request a verdict in favor of the defendant in the first ten cases.

Mr. FARNUM: Inasmuch as the defendant has requested a direction of a verdict for the defendant in the first ten cases, in behalf of the defendant, I ask the court to direct a verdict in favor of the plaintiff for the ten penalties in the first ten cases.

The COURT: Gentlemen, you will render a verdict in favor of the plaintiff for $500.00.

Mr. MOOT: Your honor notes us an exception to that.

The jury thereupon rendered a verdict for plaintiff for ten penalties of $50 each in the first ten cases, and the court directed that an order be entered that all exceptions of each party be heard in the appellate division in the first instance, all proceedings to be stayed meantime.

211 And because the foregoing proceedings, testimony, exhibits and exceptions do not appear of record, the parties hereto have caused this case and exceptions to be made, settled, signed, and filed, to the end that either party may duly notice and bring to a hearing a motion for a new trial upon the exceptions so disclosed herein.

The foregoing case settled this 2nd day of May, 1898, and ordered filed in Allegany county clerk's office.

HENRY A. CHILDS,
Justice Supreme Court.

At a term of the supreme court, held at the court-house in the village of Belmont, in and for the county of Allegany, on the 5th day of January, 1898.

Present: Hon. Henry A. Childs, justice presiding.

Supreme Court, Allegany County.

ALBERT L. PURDY
vs.
ERIE RAILROAD COMPANY.

This cause having been regularly placed upon the calendar for trial, at this term of court, and having been reached and moved in its order, the following jury was taken to hear and try the same.

212 *Jurors.*

Milo Shaw,
A. B. Pitt,
James Kane,
Ira Kemp,
John A. Carpenter,
Alonzo Crandall,
Oscar M. Vorhis,
J. N. Slade,
Charles Voss,
Aziza Moses,
S. S. Scott,
Jerome Cole.

Witnesses for Plaintiff.

Albert L. Purdy,
Thomas B. Holmes.
Joseph Demmer,

Plaintiff rests.

Motion by defendant for a nonsuit denied as to first ten causes; granted as to the other 11 causes.

Motion by defendant for a direction of a verdict for the first ten causes in favor of defendant.

Defendant may go to jury on certain matters.

Motion by plaintiff for a direction of a verdict in his favor on the first ten causes granted; verdict for plaintiff for $500.00.

Court directs exceptions to be heard in the first instance at the appellate divisions. All proceedings to be stayed the meantime.

Each party given 60 days to make case and exceptions after getting stenographer's minutes.

STATE OF NEW YORK, } ss:
Allegany Co. Clerk's Office, }

I, Geo. A. Green, clerk of the county of Allegany, and also clerk of the county and supreme courts for the said county, the
213 same being courts of record, having a common seal, do hereby certify that I have compared the foregoing copy, minutes of trial in Purdy *vs.* Erie Railroad Company, with the original thereof on file and record in this office, and that it is a correct transcript therefrom, and of the whole of such original.

Witness my hand and the seal of said county, this 28th day of April, 1898.

THOS. S. TEFFT,
Deputy Clerk.

SIR: Please take notice of an order in the within-entitled action, of which the annexed is a copy, this day entered in the office of the clerk of the county of Allegany.

Dated, Buffalo, N. Y., January 11th, 1898.

Yours, etc.,

SPRAGUE, MOOT, SPRAGUE & BROWNELL,
Attorneys for Defendant, No. 45 Erie County Savings Bank Building, Buffalo, N. Y.

To A. L. Purdy, attorney for plaintiff.

214 At a circuit of the supreme court held at the court-house in Belmont, Allegany county, N. Y., Jan'y 5th, 1898.

Present: Hon. Henry A. Childs, justice presiding.

ALBERT L. PURDY *ag'st* ERIE RAILROAD COMPANY. } Consolidated Action.

The court having granted a nonsuit in the last eleven cases consolidated herein, and the plaintiff having excepted to such ruling of the court, and the court having directed a verdict for the plaintiff as to the first ten cases consolidated herein, and the defendant having excepted to such ruling of the court, and the jury having rendered a verdict for the plaintiff as directed by the court, to which the defendant excepted, the court did thereupon, with the consent of counsel for both parties, direct that the said exceptions, and all others taken upon the trial, be heard at the appellate division for this department in the first instance, and that all proceedings herein by each party be stayed until the appellate division shall have heard

and decided motions for a new trial based upon such exceptions and a case and exceptions to be duly made and settled. Either party shall have sixty days in which to make a case and exceptions as proposed, after receiving the stenographer's minutes.

215 At a special term of the supreme court held at the city and county hall, in the city of Buffalo, in and for the eighth judicial district of the State of New York, on the 6th day of December, 1897.

Present: Hon. John Woodward, justice, presiding.

Supreme Court, Allegany County.

ALBERT L. PURDY *against* ERIE RAILROAD COMPANY. } Consolidated Action.

On reading and filing the notice of motion, affidavit of A. L. Purdy, and the proposed complaints Nos. 11, 12, A, B, and 13 to 19 both inclusive as desired to be amended, the original complaints, the said orders of consolidation and stipulations made and entered as mentioned in said affidavit; the affidavit of Adelbert Moot, the complaint in actions Nos. 2 and 14, the answers in actions Nos. 2 and 1, order — consolidation in actions 1 to 12 A, B, No. 13 and stip., and order 14 to 19 and copy clerk's and stenographer's minutes, and after hearing Caleb G. Hall, of counsel for the plaintiff, and Adelbert Moot, of counsel for the defendant, ordered that plaintiff have leave to amend his complaint in actions designated as Nos. 11, 12, A, B, and 13 to 19 inclusive, so that the complaint in each shall be read and stand as served with this notice of motion upon the plaintiff paying one bill of costs including disbursements, trial and witness' fees for the October trial term of this court, held at Belmont, Allegany county, N. Y., October 11th, 1897, fixed at $55.75. And it is further ordered that said costs be paid within ten days
216 and that in default of such payment this motion of the plaintiff be denied with costs of this motion to defendant. It is further ordered in case the pleadings shall be amended as above provided, the defendant shall accept short notice of trial if need be, so that the cause may be tried at the next trial term of this court to be held in Allegany county, N. Y. It is further ordered on stipulation of the parties in open court that in case the plaintiff shall comply with this order that the proposed complaints in said actions Nos. 11, 12, A, B, and 13 to 19 inclusive, as served with this motion be accepted, received and regarded by the defendant as personally served on the day this order shall be complied with and from thence stand as the plaintiff's pleadings in said action numbered and designated as aforesaid.

Entered December 7th, 1897.

GEORGE A. GREEN, *Clerk.*

Supreme Court, Appellate Division, Fourth Department.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Consolidated Action.

SIR: Take notice that on the case and exceptions herein and upon all pleadings and proceedings in the above-entitled action, a motion will be made at a term of the appellate division of the supreme
217 court to be held at the court-house in the city of Rochester, commencing on the 7th day of June, 1898, at the opening of court on that day, or as soon thereafter as this case may be reached on the calendar of such court at that term, for a new trial of this action, on such exceptions and for such other and further relief as to the court may seem just and equitable.

Dated Buffalo, N. Y., May 23d, 1898.

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant.

Office and P. O. address, 45 Erie County Savings Bank bldg., Buffalo, N. Y.

To Albert L. Purdy, Esq., attorney in person for plaintiff.

Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY. } Consolidated Action.

STATE OF NEW YORK,
County of Erie, City of Buffalo, } ss:

Edward C. Hard, being duly sworn, deposes and says that he is managing clerk for Moot, Sprague, Brownell & Marcy, attorneys for defendant and appellant in the above-entitled action. That
218 no opinion or decision was given by the judge on the trial of this action, as deponent is informed and verily believes.

EDWARD C. HARD.

Sworn to before me, this 11th day of May, 1898.

HERBERT A. TAYLOR,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

It is hereby stipulated that the foregoing copy of judgment-roll, case and exceptions, exhibits, orders and affidavits are correct and true transcripts and copies of and from the originals thereof, entered and on file in the office of the clerk of the county of Allegany, and that the same may be used upon the argument herein with the same force and effect as if certified by the clerk of said county.

Dated May 28th, 1898.

ALBERT L. PURDY,
Attorney in Person for Plaintiff and Respondent.
MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant and Appellant.

Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILWAY COMPANY. } Actions 1–10.

STATE OF NEW YORK,
County of Erie, City of Buffalo, } ss.:

Edward C. Hand being duly sworn deposes and says that
219 he is managing clerk for Moot, Sprague, Brownell & Marcy, attorneys for defendant and appellant in the above-entitled action. That no opinion was written or given by the justices of the appellate division of the supreme court, fourth department, on the hearing of the appeal in this action before them, as deponent is informed and verily believes.

EDWARD C. HARD.

Sworn to before me this *this* 10th day of December, 1898.
EDWARD M. SICARD,
Commissioner of Deeds in and for the City of Buffalo, N. Y.

At a term of the appellate division of the supreme court of the State of New York, in and for the fourth judicial department, at the city of Rochester, on the 7th day of October, 1898.

Present: Hon. George A. Hardin, presiding justice; Hon. David L. Follett, Hon. William H. Adams, Hon. Manly C. Green, Hon. Hamilton Ward, associate justices.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant.

The court having granted a nonsuit in eleven cases consolidated herein, and the plaintiff having excepted to such ruling, and
220 the court having directed a verdict for the plaintiff as to the first ten cases consolidated herein, and the defendant having excepted to such ruling of the court, and the jury having rendered a verdict for the plaintiff, as directed by the court, to which the defendant excepted, and the court having directed that the exceptions, and all the exceptions, taken upon the trial be heard at the appellate division in the first instance, and that all proceedings be stayed until such hearing by the appellate division, and motions for new trial based upon said exceptions, decided; and the exceptions having been heard on the 28th day of September, 1898, by the appellate division, fourth department, and due deliberation had thereon,

It is ordered and adjudged that the defendant's exceptions be and the same hereby are overruled, and motion denied, with costs, and judgment ordered for the plaintiff on the verdict, with costs.

All concur.

NEWELL C. FULTON, *Clerk.*

Supreme Court, Appellate Division, Fourth Judicial Department.

CLERK'S OFFICE, ROCHESTER, N. Y.

I, Newell C. Fulton, clerk of the appellate division of the supreme court in the fourth judicial department, do hereby certify that the annexed order is a true copy of the original, now on file in this office, and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed the seal of said court, at the city of Rochester, this 5th day of December, 1898.

[L. S.] NEWELL C. FULTON, *Clerk*.

221 Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } Consolidated Action.

Twenty-one actions, having, by various order- entered in the Allegany county clerk's office been consolidated herein, and this action having been duly brought to trial at a trial term of this court, held at the court-house in Belmont, in and for the county of Allegany, on the 4th day of January, 1898, and a nonsuit granted in eleven of the said cases consolidated herein, and the court having directed a verdict for the plaintiff as to the first ten cases consolidated herein, and the defendant having excepted to such rulings, and the jury having found a verdict for the plaintiff for the sum of $500, as directed by the court, and the defendant having excepted thereto, and the court having directed that the exceptions taken upon the trial be heard at the appellate division in the first instance, and that all proceedings be stayed until such hearing, and the exceptions having been heard on the 28th day of September, 1898, by the appellate division, fourth department, and due deliberation had therein, and it having been ordered and adjudged by said court that defendant's exceptions be and the same were overruled and motion denied with costs and judgment ordered for plaintiff on verdict with costs, and the remittitur of the said appellate division duly certified by the clerk of said court having been duly filed with the original stipulated case on appeal or on said hearing constituting the judgment-roll herein, and the plaintiff's costs having been duly taxed,

222 as provided in the order consolidating such actions, entered on December 18, 1896, at the sum of $647.51,

On motion of A. L. Purdy, plaintiff's attorney, it is ordered, adjudged and decreed that the plaintiff, Albert L. Purdy, recover of the defendant Erie Railroad Company, the said sum of $500, said verdict, and the further sum of twenty-three dollars and fifty-eight cents ($23.58) the interest on said verdict from said 4th day of January, 1898, to this date, and said sum of ($647.51) six hundred forty-seven dollars and fifty-one cents, costs so taxed, making in all the sum of one thousand one hundred seventy-one dollars and nine cents ($1,171.09) and that plaintiff have execution therefor.

Judgment perfected this 17th day of October, 1898, at 2.30 p. m.

THOMAS G. TIFT,
Deputy Clerk.

Supreme Court, Allegany County.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant.

SIRS: Please take notice that the defendant, Erie Railroad Company, appeals to the court of appeals from the judgment of the appellate division of the supreme court, fourth department, herein entered in the office of the clerk of the county of Allegany on the 17th day of October, 1898, overruling defendant's exceptions taken upon the trial of said action, and heard by the appellate division
223 in the first instance, directing a verdict in favor of the plaintiff for the sum of five hundred dollars ($500.00) and costs, and entered for the sum of $523.58 damages, and interest, and the sum of $537.51 costs as retaxed, and from the whole and every part of said judgment.

Dated November 4th, 1898.

Yours, etc.,

MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant, No. 45 Erie County Savings Bank Building, Buffalo, N. Y.

To clerk of the county of Allegany and to A. L. Purdy, Esq., attorney for respondent:

It is hereby stipulated that the foregoing copy of judgment-roll, case and exceptions, exhibits, judgments, orders and affidavits, notices, etc., is a true and correct transcript of and from the originals thereof entered and on file in the office of the clerk of the county of Allegany, and that the same may be used upon the argument herein, with the same force and effect as if signed and certified by said clerk.

ALBERT L. PURDY,
Attorney in Person for Plaintiff and Respondent.
MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Defendant and Appellant.

(Here follows map marked p. 224.)

225 STATE OF NEW YORK, *ss:*

Court of Appeals.

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 27th day of February, in the year of our Lord one thousand nine hundred, before the judges of said court.

Witness the Hon. Alton B. Parker, chief judge, presiding.

W. H. SHANKLAND, *Clerk.*

MAP(S) IS/ARE TOO LARGE TO BE FILMED

Remittitur, February 27th, 1900.

ALBERT L. PURDY, Respondent,
ag'st
ERIE RAILROAD COMPANY, Appellant.

Be it remembered that on the 5th day of January, in the year of our Lord one thousand eight hundred and ninety-nine, Erie Railroad Company, the appellant in this action, came here into the court of appeals, by Moot, Sprague, Brownell & Marcy, its attorneys, and filed in the said court a notice of appeal and return thereto from the judgment of the appellate division of the supreme court in and for the fourth judicial department; and Albert L. Purdy, the respondent in said action, afterwards appeared in said court of appeals, by Albert L. Purdy, attorney in person.

Which said notice of appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said court of appeals, having heard this cause argued by Mr. Adelbert Moot, of counsel for the appel-
226 & 227 lant, and by Mr. Clarence A. Farnum, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the supreme court appealed from in this action be in all things affirmed; and it was further ordered and adjudged that the respondent recover against the appellant costs of appeal in this court.

And it was also further ordered that the record aforesaid and the proceedings in this court be remitted to the said supreme court, there to be proceeded upon according to law; therefore it is considered that the said judgment be in all things affirmed, with costs, as aforesaid, and stand in full force, strength, and effect.

And hereupon as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid by them given in the premises are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court, before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of appeals, clerk's office.

ALBANY, *February 27th,* 1900.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the court of appeals, with the papers originally filed therein attached thereto.

State of New York (Seal impressed on gold leaf)
Court of Appeals.

W. H. SHANKLAND, *Clerk.*

[Endorsed:] Court of appeals. Albert L. Purdy, resp't, against Erie Railroad Company, app'l't. Remittitur. A. L. Purdy, att'y for resp't, Wellsville, N. Y.

228 At a special term of the supreme court of the State of New York, held at the city and county hall, in the city of Buffalo, New York, in and for the county of Erie, on the 5th day of March, 1900.

Present: Honorable John S. Lambert, justice, presiding.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY.

The defendant, The Erie Railroad Company, having appealed to the court of appeals from the judgment of the appellate division of the supreme court of the fourth judicial department, entered in the office of the clerk of Allegany county, New York, October 17, 1896, overruling defendant's exceptions taken upon the trial of the issues in this action, and the said court of appeals having affirmed the judgment of this court, now, on reading and filing the remittitur from the court of appeals, bearing date February 27th 1900, and on motion of Albert L. Purdy, attorney for the plaintiff in person for the respondent, it is—

Ordered that the judgment of the court of appeals be, and the same hereby is, made the judgment of this court, with $134.69 costs, and that the respondent, Albert L. Purdy, have execution thereon against the defendant, The Erie Railroad Company.

Erie Special Term, Mar. 5th, 1900.

Granted and ordered entered in Allegany county clerk's office.

FRANK J. TITUS,
Sp. Dep. Clerk.

Entered March 6th, 1900.

GEO. A. GREEN, *Clerk.*

229 [Endorsed:] Supreme court. Albert L. Purdy *vs.* Erie Railroad Company. Order making judgment of court of appeals the judgment of this court. A. L. Purdy, pl'ff's att'y in person, Wellsville, N. Y. Allegany Co. clerk's office. Entered March 6, 1900. George A. Green, clerk.

230 Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY.

STATE OF NEW YORK,
Allegany County Clerk's Office, } *ss:*

I, George L. Green, clerk of said county, do hereby certify that I have compared the annexed copy of record of appeal to the court of

appeals, remittitur, and judgment, and of all proceedings had and entered in the above cause, and copy of endorsements thereon, with the originals thereof and *its* endorsements, entered and on file in this office, and find the same to be true transcripts of and from said originals and the whole of each thereof; that attached thereto are the writ of error, with allowance endorsed thereon; a copy of the citation, with acceptance of service endorsed thereon; a copy of the bond, and assignment of errors.

In witness whereof I have hereunto set my hand and affixed the seal of said county, in Belmont, this 19th day of June, A. D. 1900

[Seal Allegany County.]

Per THOS. S. TEFFT, *Dep. Clerk.*

[Ten-cent U. S. internal revenue stamp, canceled 6, 19, '00. T. S. T.]

231 [Endorsed:] County clerk's certificate.

232 UNITED STATES OF AMERICA:

Supreme Court.

ALBERT L. PURDY, Plaintiff,
against
ERIE RAILROAD COMPANY, Defendant. } At Law. Petition for Writ of Error.

To the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States:

Comes now the defendant, Erie Railroad Company, and says that it is a corporation duly organized and existing in the State of New York under and by virtue of the laws of the State of New York; that said defendant was incorporated under the statutes of said State as the result of the sale of the property of a corporation known as the New York, Lake Erie and Western Railroad Company and the reorganization of said corporation, the New York, Lake Erie and Western Railroad Company, in accordance with the statutes of the State of New York in such case made and provided, as appears by the certificate of incorporation of said defendant offered in evidence by the plaintiff on the trial of this action and duly filed in the office of the secretary of state November 14th, 1895.

That October 17th, 1898, a judgment of the supreme court of the State of New York was entered in the clerk's office of the county of Allegany, in said State, against said Erie Railroad Company, defendant, and in favor of said Albert L. Purdy, plaintiff, adjudging that the defendant should pay to the plaintiff five hundred dollars ($500.00), being ten separate penalties of fifty dollars ($50.00) each, for violation of "An act in relation to the issue of mileage books by railroad corporations," constituting chapter 1027 of the Laws
233 of 1895, as amended by chapter 835 of the Laws of 1896 of the State of New York; that in addition thereto the defendant was required to pay the plaintiff $23.58 interest on said five hundred dollars ($500.00) from January 5th, 1898; that in addition thereto the defendant was required to pay the plaintiff six hundred

and forty-seven dollars and fifty-one cents ($647.51) costs, as taxed; that said judgment awarded the plaintiff execution against this defendant for eleven hundred and seventy-one dollars and nine cents ($1,171.09); that said judgment was entered upon the verdict of a jury, which verdict was directed in favor of the plaintiff and against the defendant by Mr. Justice Henry A. Childs, despite defendant's exception to such direction thereof, at a regular term of the supreme court held in Allegany county, January 5th, 1898.

That said defendant duly moved for a new trial at the appellate division of the supreme court of the State of New York upon its answers, claim that said statute was unconstitutional, and said exception with others, but October 7th, 1898, the exceptions of this defendant were overruled, such motion for a new trial was denied, and judgment was awarded the plaintiff upon such verdict, with costs; which judgment was thereafter duly entered, in form and manner aforesaid, October 17th, 1898.

That thereafter this defendant, in due and proper form, duly appealed from said judgment to the court of appeals of the State of New York; that upon such appeal the Erie Railroad Company insisted and claimed in substance, among other things, that chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of the State of New York for the year 1896, was unconstitutional and void within the provisions of the Constitution of the United States;

234 that February 27th, 1900, the court of appeals of the State of New York, being the highest court of law and equity in said State of New York, affirmed said judgment upon an opinion by Associate Judge Cullen; a true and full copy of which opinion is annexed hereto as a part hereof, that the grounds thereof may more fully appear, and that it may appear therefrom that this defendant, Erie Railroad Company, has been denied its rights under the Constitution of the United States; that on the 6th day of March, 1900, an order was duly entered in the clerk's office of the county of Allegany, in the State of New York, upon a remittitur of the court of appeals; by which order the remittitur of the court of appeals was made the judgment of the supreme court of the State of New York, thus affirming the previous judgment rendered in all things, with one hundred and thirty-four dollars and sixty-nine cents ($134.69) costs, as taxed, for which execution was awarded to said Albert L. Purdy against this defendant, said Erie Railroad Company.

That thereafter this defendant, said Erie Railroad Company, duly moved the court of appeals of the State of New York for a re-argument upon the ground, in substance, that said judgment and remittitur of the court of appeals was erroneous, in that it denied this defendant its rights under the Constitution of the United States, but that said motion was denied, without an opinion, May 1st, 1900; but no further order or judgment was necessary or was entered upon such decision, because by previous decisions the judgment of the supreme court of the State of New York had become the judgment of the court of appeals of the State of New York as against this defendant.

That this defendant, Erie Railroad Company, was and is aggrieved, in that in said judgment and proceedings had prior thereunto in this cause several errors were committed, to the prejudice of this defendant, all of which will appear in detail in the assignment of errors filed with this petition.

235 This defendant further says that the plaintiff, Albert L. Purdy, is an attorney-at-law and is now a resident of Wellsville, Allegany county, N. Y., and that this defendant is a domestic corporation of the State of New York, as aforesaid, and is now a resident of the city of New York and State of New York, having its principal place of business in the city of New York, in said State; that the business of this defendant is carrying passengers and freight for hire, and doing other business incident thereto, in the States of New York, New Jersey, Pennsylvania, Ohio, Indiana, and Illinois, within which States it operates its lines of railroad; that the plaintiff commenced bringing actions against this defendant June 29th, 1896, and continued to bring actions against this defendant from time to time until August 31st, 1897; that in all the plaintiff brought twenty-one (21) different actions against this defendant between the 29th day of June, 1896, and the 31st day of August, 1897; that nineteen (19) of said actions were brought against this defendant in the supreme court, Allegany county, and two (2) of said actions were brought against this defendant in justice's court in the town of Wellsville, Allegany county, State of New York; that each of said actions was brought against this defendant to recover a penalty of fifty dollars ($50.00) on the claim that this defendant had violated "said statute, section 1 of chapter 1027 of the Laws of 1895, as amended by section 1 of chapter 835 of the Laws of 1896;" that the alleged violation in substance claimed in each case was that this defendant had refused to issue to the plaintiff a proper mileage book, at a reduced rate of fare, pursuant to the provision of said statute as amended, as aforesaid.

That in its answer in each of said actions said Erie Railroad Company did claim that said amended statute was "unconstitu-
236 tional and void because it is in violation of the provisions of the Constitution of the United States, which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States."

That all of said actions were duly consolidated into one action by orders of the supreme court duly made without prejudice to the rights of either party, in accordance with the law and practice of the State of New York in such case made and provided.

That this defendant continued to make such claim with reference to such statute as amended at the trial and at the appellate division of the supreme court and in the court of appeals of the State of New York; that this defendant, said Erie Railroad Company, did claim in particular the protection of the provisions of section 1 of article XIV of the Constitution of the United States, but that each of the courts of the State of New York, from the lowest to the highest, de-

nied to this defendant its constitutional rights so claimed in its behalf in each of said courts.

That by virtue of the judgment of the State of New York a statute of the State of New York that violates the Constitution of the United States is being enforced against this defendant, and its rights under the Constitution of the United States are being denied to this defendant, said Erie Railroad Company.

Wherefore defendant prays that a writ of error may issue to the supreme court of the State of New York or to the proper court
237 for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the said Supreme Court of the United States.

ERIE RAILROAD COMPANY,
By ADELBERT MOOT, *Its Attorney.*

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } ss.:

Adelbert Moot, being duly sworn, says that he has read the foregoing petition and knows the contents thereof, and the same is true to the knowledge of deponent except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that all of the matters stated in said petition are within the personal knowledge of deponent.

ADELBERT MOOT.

Sworn to before me this 30 day of May, 1900.

[Seal of J. S. McDonnell, Notary Public, Erie County, N. Y.]

J. S. McDONNELL,
Notary Public in and for Erie Co., New York.

238 ALBERT L. PURDY, Respondent, }
v.
ERIE RAILROAD COMPANY, Appellant. }

(Decided February 27, 1900.)

Appeal from a judgment of the appellate division, fourth department, overruling the defendant's exceptions and directing the entry of judgment in favor of the plaintiff upon the verdict of a jury directed by the court at trial term.

Adelbert Moot, for appellant.
Clarence A. Farnum, for respondent.

CULLEN, *J.:*

This action, similar in character to that of Beardsley *v.* N. Y., L. E. & W. R. R. Co., is brought to recover penalties for the refusal of the defendant to issue mileage books as prescribed by chapter 1027 of the Laws of 1895, as amended by chapter 835 of the Laws of 1896. The record in this case, however, differs materially from that

in the Beardsley case, both in its facts and in the objections taken by the counsel to the right of the plaintiff to recover. The complaints (there were originally several actions, which were subsequently consolidated into one) allege that the defendant was a railroad corporation organized under the laws of this State, and then set forth the various matters necessary to bring the defendant within the terms of the statute and the details of the plaintiff's applications for mileage books and the defendant's refusal to issue them. They do not state when the defendant was incorporated. The answers to the several causes of action admitted the incorporation of the defendant and certain other allegations of the plaintiff in reference to the mileage of road operated by the de-
239 fendant and its rates of fare, and put in issue the other averments of the complaint. They further set up that the defendant owned and operated a railroad extending through several States, and charged that the statute of 1896 "is unconstitutional and void because it is in violation of the provision of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States and of the constitution of the State of New York." On the trial of the action the plaintiff put in evidence the certificate of the defendant's incorporation, of which the record contains only the following: "Certificate referred to shows that the Erie railroad corporation, defendant, was duly organized and incorporated November 14, 1895, under the general laws of the State of New York for the incorporation of railroads." The earliest refusal to issue a mileage book, for which it is sought to recover the penalty, occurred on June 26, 1896. The defendant put in evidence a map showing the various lines of the Erie railroad extending through this State and others and, "to make the description of the lines of the defendant more certain," as was stated by the counsel in offering them, two deeds—one from Arthur H. Masten, special master, to Charles Caster and others and the other from Caster and others to the defendant. All the record states of these deeds is that they were "of the New York, Lake Erie & Western lines," and that they were delivered and recorded in November, 1895. This is all that appears concerning the original title to defendant's road. There is nothing to show the defendant has succeeded to the rights or franchises of any company antedating the enactment of the statute of 1895. While our personal knowledge may inform us of the history of the railroad lines operated by the defendant, to that we cannot
240 appeal, and we can indulge in no presumption as to the existence of facts not appearing in the record. As the case stands before us, we have a railroad company created after the statute of 1895, and whose franchises and property rights must be assumed to have accrued subsequently to that time. The question, therefore, is whether the statute of 1895, though void as to existing railroad companies, is not constitutional and valid as to companies organized and acquiring property and franchises in the future.

That a statute which is unconstitutional, so far as it purports to operate retrospectively, may be upheld as to future cases is settled by authority (People *v.* O'Neil, 109 N. Y., 251; Cooley Const. Lim., 180). We do not assent, however, to the broad claim of the learned counsel for the respondent that a corporation cannot object to the constitutionality of any statute enacted by the State prior to the time of its organization. Whether the proposition contended for is true or false depends on the ground on which the invalidity of the statute is assailed or declared. If the State should require or enact that railroad companies thereafter organized must subject the management and conduct of any interstate transportation and business they may carry on to State control, such a statute would be void as in contravention of the Constitution of the United States, which commits to Congress the regulation of interstate commerce. It is probable that there are provisions of the State constitution, such as those regulating the administration of justice and ordained for the security of persons and property, which the legislature could not require even future corporations to waive as a condition of their charters; but the ground on which the Supreme Court of the United States in the case of Lake Shore, etc., *v.* Smith (173 U. S., 684) held the mileage-book act unconstitutional was that it was an invasion
241 of the property rights of the railroad company, in that it required the company to transport persons willing and able to purchase thousand-mile books at a less sum than the general or maximum rate allowed by law; in other words, that it compelled the company to surrender, as to such persons, the difference between the special rate of fare and the regular rate. This exaction was illegal, because it was without due process of law. We know of no reason, however, why a railroad company may not agree, upon sufficient consideration, to surrender or transfer any specific pecuniary right. The right to contract as to property is one of the inherent rights of a citizen of which he cannot be deprived, except as to that class of contracts which are condemned in the exercise of the police power, such as usury and the like (People *v.* Gillson, 109 N. Y., 389). The same liberty to contract exists in the grant of charters by the legislature. Therefore a regulation as to the price of transportation, which would be an illegal exaction when sought to be imposed on existing corporations solely by legislative fiat, may, in the case of future corporations, be the mere performance of the obligation of a contract. The authority to construct and operate a railroad is not the natural right of a citizen, but a franchise proceeding from the favor or grant of the State. As a condition of such grant the legislature might require the company to transport passengers at any prescribed rate of fare; equally, it may require that certain classes of passengers be transported at a particular rate of fare, or that any passenger, under certain circumstances and on compliance with certain requirements, be transported at such rate. In Railroad Co. *v.* Maryland (21 Wall., 456) the Supreme Court of the United States said: "This unlimited right of the State to charge, or to authorize others to charge, toll, freight, or fare for transportation on its
242 roads, canals, and railroads arises from the simple fact that they are its own works or constructed under its authority. It

gives them being. It has a right to exact compensation for their use." So it was held that a reservation by the State to itself of one-fifth of the receipts for transportation of passengers was valid, and it was said that the State might have exacted the whole receipts. (See also Ashley *v.* Ryan, 153 U. S., 436, and L. & N. R'y Co. *v.* Ky., 161 U. S., 167.)

The statute of 1896 was passed subsequently to the incorporation of the defendant, and if the statute increased the burden imposed on the defendant by the act of 1895, as to such additional burden it would be invalid, but a comparison of the two acts shows that all the modifications of the statute of 1895 effected by the statute of 1896 are favorable to the railroad company. By the first act the mileage books entitled the holder, *i. e.*—the bearer or assignee—to transportation; by the second the use of the book is limited to the purchaser and to certain members of his family and employees. By the act of 1895 there was imposed on the company the general duty to issue mileage books; by that of 1896 the company is required to keep such books for sale only at stations in incorporated villages and cities. By the earlier statute the company was practically required to accept the mileage books from passengers on the train in lieu of tickets. By the latter act the mileage book can be used only in the purchase at the ticket office of a ticket for the proposed journey. We are of opinion, therefore, that the enactment of 1896 is constitutional and valid in the same cases where the statute of 1895 would be upheld.

While we have discussed at some length the constitutionality of the statutes of 1895 and 1896 as applied to future corporations, we doubt very much whether the defendant's objections and exceptions are sufficient to raise the question. So far as the pleadings
243 are concerned the only attack on the validity of the statutes is that already quoted from the defendant's answer. At the opening of the trial the defendant moved to dismiss the complaint because it failed to state facts sufficient to constitute a cause of action for a penalty. No particular ground for the attack on the complaint is stated. At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. The objection that the statute was an invasion of the defendant's property rights and contravened for that reason either the Constitution of the United States or the constitution of this State does not anywhere appear in the record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below (Vose *v.* Cockroft, 44 N. Y., 415; Delaney *v.* Brett, 51 N. Y., 78).

The objection that the statutes of 1895 and 1896 are regulations of interstate commerce, and hence in conflict with the Federal Constitution, is satisfactorily dealt with in the very clear opinion of Mr. Justice Merwin, of the appellate division, delivered in the Beardsley case (15 App. Div., 251). That such a statute, if limited in its scope to transportation wholly within the limits of the State, is a valid

exercise of State authority is settled by the decision of the Supreme Court of the United States in Stone *v.* Farmers' Loan & Trust Co. (116 U. S., 307), where it was said: "It (the State) may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State." This doctrine has never been overruled or limited; on the contrary, it is fully recognized in the later cases (Hennington *v.* Georgia,
244 163 U. S., 299; W. U. Tel. Co. *v.* James, 162 U. S., 650; L. S. & M. S. R. Co. *v.* Ohio, 173 U. S., 285). In Wabash, etc., R'y Co. *v.* Illinois (118 U. S., 557) a statute of Illinois regulating fares was held void solely on the ground that the act, as interpreted by the supreme court of the State, included cases of transportation partly within and partly without the State. It was there stated: "If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid." There is nothing in the language of the statutes now before us that shows they were intended to affect any but interstate transportation; but if their interpretation is doubtful "the courts must so construe a statute as to bring it within the constitutional limits, if it is susceptible of such construction" (Sage *v.* City of Brooklyn, 89 N. Y., 189; People *v.* Terry, 108 N. Y., 1). Within this principle these statutes must be construed as applying to transportation wholly within the State, and as so construed they do not infringe upon the Constitution of the United States.

The judgment appealed from should be affirmed with costs.

Parker, ch. J.; Gray, Bartlett, Vann, and Werner, JJ., concur; Martin, J., concurs in result.

Judgment affirmed.

A copy.

E. H. SMITH, *Reporter.*
C.

245 UNITED STATES OF AMERICA:

Supreme Court.

ALBERT L. PURDY, Defendant in Error,
against
ERIE RAILROAD COMPANY, Plaintiff in Error.

That said plaintiff in error, Erie Railroad Company, by Adelbert Moot, its attorney, now comes into the Supreme Court of the United States and for assignment of errors herein says:

That in the record and proceedings and in the judgment in said cause there is manifest error in this, to wit:

1. That the supreme court of the State of New York erred and violated article XIV of the Constitution of these United States in holding and determining that chapter 1027 of the Laws of the State of New York for the year 1895 as amended by chapter 835 of the Laws of the State of New York for the year 1896, entitled "An act

in relation to the issue of mileage books by railroad corporations," did not and does not violate the provisions of article XIV, subdivision 1, of the Constitution of the United States, and in holding and determining that by the refusal of the plaintiff in error to issue mileage books to the defendant in error under said statute the plaintiff in error has forfeited ten separate penalties of fifty dollars ($50.00) each to the defendant in error, and the defendant in error is entitled to recover judgment therefor against the plaintiff in error.

2. That the supreme court of the State of New York erred and violated article I of the Constitution of these United States in holding and determining that chapter 1027 of the Laws of the State
246 of New York for the year 1895 as amended by chapter 835 of the Laws of the State of New York for the year 1896, entitled "An act in relation to the issue of mileage books by railroad corporations," did not and does not violate the provisions of article I of the Constitution of the United States, and in holding and determining that by the refusal of the plaintiff in error to issue mileage books to the defendant in error under said statute the plaintiff in error has forfeited ten separate penalties of fifty dollars ($50.00) each to the defendant in error, and the defendant in error is entitled to recover judgment therefor against the plaintiff in error.

That the judgment of the supreme court of the State of New York, wherein the supreme court of the State of New York erred and violated article I of the Constitution of these United States and article XIV, subdivision 1, of the Constitution of these United States, as aforesaid, was entered in the clerk's office of the supreme court of the State of New York in and for the county of Allegany on the 17th day of October, 1898, and said judgment adjudged that said plaintiff in error, said Erie Railroad Company, should pay to said defendant in error, said Albert L. Purdy, ten separate penalties of fifty dollars ($50.00) each for the violation of the statutes aforesaid; that said last-named judgment, rendered in the supreme court of the State of New York, was duly affirmed by the court of appeals of said State, it being the highest court of law and equity in said State in which a decision could be had in said cause; that said judgment should be reversed for the reasons following, namely:

That the said judgment of the supreme court of the State of New York is repugnant to article I of the Constitution of the United States, which provides that "the Congress shall have power * * * to regulate commerce * * * among the several States;"
247 that the said judgment of the supreme court of said State is also repugnant to article XIV of the Constitution of the United States, which provides that no State shall "deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

There is error also in this, to wit: That by the record aforesaid it appears that the judgment aforesaid was given for the said Albert L. Purdy against the said Erie Railroad Company, whereas by the law of the land the said judgment ought to have been given for the said Erie Railroad Company against the said Albert L. Purdy; and the

said Erie Railroad Company prays that the judgment aforesaid, for the errors aforesaid and other errors in the record and proceedings and the matters herein set forth in said cause, may be reversed and held for nothing, and that said Erie Railroad Company may be restored to all things which it may have lost by occasion of said judgment.

ADELBERT MOOT,
Attorney for Plaintiff in Error, Buffalo, N. Y.

248 [Endorsed:] Supreme Court United States. Albert L. Purdy against Erie Railroad Company. Original. Petition, opinion, and assignment of errors. Moot, Sprague, Brownell & Marcy, attorneys for Erie Railroad Company; office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y. Due and personal service of a copy of the within petition, opinion, and assignment of errors is hereby admitted this 19th day of June, 1900. A. L. Purdy, attorney for d'f't in error.

249 Know all men by these presents that we, Erie Railroad Company, a corporation of the State of New York, residing in said State and having its principal place of business in New York city, in said State, as principal, and the United States Fidelity and Guaranty Company, a corporation duly organized under the laws of the State of Maryland and authorized to do business in the State of New York by the laws of the State of New York, as surety, are held and firmly bound unto Albert L. Purdy in the full sum of four thousand dollars ($4,000.00), to be paid to the said Albert L. Purdy, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 29th day of May, in the year of our Lord one thousand nine hundred.

Whereas lately, at a regular term of the supreme court of the State of New York, in a suit pending in said court between Albert L. Purdy, plaintiff, and said corporation, Erie Railroad Company, defendant, a judgment was rendered against the said Erie Railroad Company, defendant, and entered and docketed in the Allegany county clerk's office October 17th, 1898, for eleven hundred and seventy-one dollars and nine cents ($1,171.09), damages and costs, and thereafter said judgment was in all things affirmed by the court of appeals of the State of New York, and the remittitur of affirmance by said court of appeals was thereafter made the judgment of the supreme court of the State of New York, and further judgment was thereupon entered and docketed in said Allegany county clerk's office in favor of said Albert L. Purdy and against said Erie Railroad Company for the additional sum of one hundred and
250 thirty-four dollars and sixty-nine cents ($134.69), costs; and

Whereas said corporation, Erie Railroad Company, feels aggrieved thereby and is about to make application to the chief judge of the court of appeals of the State of New York or to a justice

of the Supreme Court of the United States to allow said Erie Railroad Company a writ of error, and to cause such writ of error to issue from the Supreme Court of the United States in due form of law, to the end that a justice of the Supreme Court of the United States may cause a citation to issue, directed to the said Albert L. Purdy, citing and admonishing him to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date thereof, and to the end that such other proceedings may be taken that the judgments rendered and proceedings had in said cause may be returned to the Supreme Court of the United States, to be reviewed and considered by it, to the end that such judgment may be reversed:

Now, the condition of the above obligation is such that if the said Erie Railroad Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

ERIE RAILROAD COMPANY,
By ADELBERT MOOT, *Its Attorney.* [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.
VINCENT RYAN, *Attorney-in-fact.*

Sealed and delivered in the presence of—
J. S. McDONNELL.

[Cancelled revenue stamps, 6c.]

251 STATE OF NEW YORK, } ss:
County of Erie, City of Buffalo, }

On this 29th day of May, 1900, before me personally came Vincent D. Ryan, attorney-in-fact of the United States Fidelity and Guaranty Company, a corporation created and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact business in the State of New York, to me known, who, being by me duly sworn, did depose and say that he resided in the city of Buffalo; that he is the attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to the said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto as attorney-in-fact of said company by like order; that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3 of chapter 720 of the Session Laws of the State of New York for the year 1893 and the acts amendatory thereof and supplementary thereto.

[NOTARIAL SEAL.] J. S. McDONNELL,
Notary Public in and for Erie Co., New York.

At a special meeting of the board of directors of the United States Fidelity and Guaranty Company, held at the office of the company, in the city of Baltimore, State of Maryland, on the 19th day of January, 1899, at which was present a quorum of said directors duly authorized to act in the premises, on motion it was unanimously—

Resolved, That in pursuance of section 811 of the Code of Civil Procedure of the State of New York, James Ryan, Vincent D. Ryan, and Austin F. Ryan, the attorneys-in-fact of the United States Fidelity and Guaranty Company for the county of Erie, in the State of New York, be and each of them is hereby authorized and empowered to sign, execute, and deliver any and all bonds or undertakings for and in behalf of this company, and to attach thereto the seal of the company, the same to be attested by either one of said attorneys-in-fact named, as occasion may require.

CITY OF BUFFALO, } ss:
County of Erie, State of New York, }

I, Vincent D. Ryan, attorney-in-fact of the United States Fidelity and Guaranty Company, have compared the foregoing resolution with the original thereof as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom and of the whole of said original resolution.

Given under my hand and the seal of the company, at Buffalo, N. Y., this 29th day of May, 1900.

VINCENT D. RYAN,
Attorney-in-fact.

[Stamped:] Allegany Co. clerk's office. Geo. A. Green, clerk. Filed Jun- 19, 1900.

STATE OF NEW YORK, } ss:
Allegany Co. Clerk's Office, }

I, Geo. A. Green, clerk of the county of Allegany and also clerk of the county and supreme courts for the said county, the same being courts of record, having a common seal, do hereby certify that I have compared the foregoing copy — bond in action Purdy against Erie Railroad Company and endorsements thereon with the original thereof on file in this office, and that it is a correct transcript therefrom and of the whole of such original.

Witness my hand and the seal of said county, at Belmont, this 19th day of June, 1900.

[Seal Allegany County, N. Y.]

Per THOS. S. TEFFT, *Dep. Clerk.*

[10c. U. S. internal-revenue stamp, canceled 6, 19, '00. T. S. T.]

252 [Endorsed:] Supreme Court United States. Albert L. Purdy against Erie Railroad Company. Copy. Undertaking. Moot, Sprague, Brownell & Marcy, attorneys for Erie R. R. Company. Office and P. O. address, 45 Erie County Savings Bank

building, Buffalo, N. Y. Approved May 31, 1900. R. W. Peckham, justice Supreme Ct. U. S. May 31. Due and personal service of a copy of the within undertaking is hereby admitted this 19th day of June, 1900. A. L. Purdy, attorney for pl'ff.

253 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court on a remittitur from the court of appeals of the State of New York, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Albert L. Purdy, plaintiff, and Erie Railroad Company, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said defendant, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid,
254 with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 4th day of June, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

31 May, 1900.

255 [Endorsed:] Supreme Court United States. Albert L. Purdy against Erie Railroad Company. Original. Writ of error. Moot, Sprague, Brownell & Marcy, attorneys for Erie Railroad Company. Office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y. Due and personal service of a copy of the within writ of error is hereby admitted this 19th day of June, 1900. A. L. Purdy, attorney for pl'ff.

256 UNITED STATES OF AMERICA, *ss:*

To Albert L. Purdy, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, wherein Erie Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 31 day of May, in the year of our Lord one thousand nine hundred.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

WELLSVILLE, *June* 19, 1900.

I hereby admit due service of the within citation upon me this 19 day of June, 1900.

A. L. PURDY,
Defendant in Error.

257 [Endorsed:] Supreme Court United States. Albert L. Purdy against Erie Railroad Company. Original. Citation. Moot, Sprague, Brownell & Marcy, attorneys for Erie Railroad Co. Office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y.

258 STATE OF NEW YORK:

Supreme Court, Allegany County.

ALBERT L. PURDY
against
ERIE RAILROAD COMPANY.

It is hereby stipulated and agreed by and between the respective parties herein that the annexed and foregoing is a true and correct copy of the record and all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said court and filed in the office of the clerk of the county of Allegany, as appears of record

and on file in said cause, and that the same is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon; the citation, with acceptance of service endorsed thereon; a copy of the bond to the adverse party, filed with the writ of error, and the assignment of errors in the Supreme Court of these United States.

Dated June 19, 1900.

A. L. PURDY, *Def't in Error.*
MOOT, SPRAGUE, BROWNELL & MARCY,
Attorneys for Plaintiff in Error.

259 [Endorsed:] Stipulation.

Endorsed on cover: File No., 17,924. New York supreme court. Term No., 439. The Erie Railroad Company, plaintiff in error, *vs.* Albert L. Purdy. Filed October 8th, 1900.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 439.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

ALBERT L. PURDY, DEFENDANT IN ERROR.

BRIEF OF PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM.

Error to Supreme Court of New York.

STATEMENT.

This case comes to this Court upon a writ of error to the Supreme Court of the State of New York, from the judgment of that Court, making the judgment of the Court of Appeals of that State the judgment of said Court, thereby affirming an order and judgment of the Appellate Division of the Supreme Court for the Fourth Department, which overruled the exceptions of said Erie Railroad Company and ordered judgment against it, which judgment was thereupon entered in the clerk's office of the County of Allegany on the 17th day of October, 1898, for $523.58 damages and interest, and $537.51 costs, to which was added $134.69 costs on the appeal to the Court of Appeals by the judgment entered on the remittitur of that Court March 6th, 1900. (Record, p. 104, fols. 210–211; p. 107, fol. 217; pp. 108–109, fols. 220–222; p. 112, fols. 228–229.)

The judgment is for ten penalties of $50 each, in ten actions, afterwards consolidated, such penalties being based upon the refusal of the Erie Railroad Company to comply with ten written demands

of Albert L. Purdy that the Erie Railroad Company deliver to him a "mileage book entitling the holder thereof to travel 1,000 miles "on the line or lines of your road, required to be issued by you "under Chapter 1027 of the Laws of 1895, as amended by Chapter "835 of the Laws of 1896, of the State of New York." (Record, p. 71, fol. 147.)

These demands were made June 26, 1896, June 29, 1896, July 1, 1896, July 3, 1896, July 10, 1896, July 12, 1896, July 15, 1896, August 22, 1896, August 25, 1896, August 27, 1896, and all these demands were made after Chapter 835 of the Laws of 1896 had become the only statute on the subject that was enforceable. Upon these demands the ten separate actions, afterwards consolidated, upon which the judgment in question is based, were brought June 29, 1896, June 30, 1896, July 2, 1896, July 7, 1896, July 13, 1896, August 13, 1896, August 17, 1896, August 24, 1896, August 26, 1896, August 28, 1896. (Record pp. 71–77, fol. 159.)

None of these written demands were limited to the line or lines of the Erie Railroad Company within the State of New York, but each of these written demands were for "a mileage book * * * to travel 1,000 miles on the line or lines of your road." (Record, p. 71, fol. 147; p. 72, fols. 149–150; p. 73, fol. 152; p. 74, fol. 154; p. 75, fols. 155; p. 76, fols. 156, 157, 158; p. 77, fol. 158.)

These demands followed the language of the statute, and some of them contained the substance if not the express words of the statute, by which the holder of the mileage book would be entitled "to the same rights and privileges to which the highest class ticket "issued by you would entitle such holder, such mileage book to be "good until all coupons attached thereto are used." (Record, p. 74, "fol. 154.

Those demands that did not expressly incorporate this language into them did do so in effect by requiring the Erie Railroad Company to issue the mileage books "required to be issued by you under "Chapter 1027 of the Laws of 1895 as amended by Chapter 835 of "the laws of 1896." (Record, p. 71, fol. 147 to p. 77, fol. 159.)

This is so because the act of 1896 adds the following words, among others: "The holder of any such mileage book shall be "entitled, upon surrendering, at any ticket office on the line or lines "of such railroad, coupons equal in number to the number of miles "which he or any member of his family, or firm, or a salesman "of such firm, wishes to travel on the *line or lines of such railroad*, to

"a mileage exchange ticket therefor. Such mileage exchange "ticket shall entitle the holder thereof without producing the "mileage book upon which such exchange ticket was issued, *to the "same rights and privileges* in respect to the transportation of person "and property *to which the highest class ticket issued* by such corpora- "tion would entitle him. Such mileage books shall be good until "all the coupons attached thereto have been used." This is all entirely new and a very onerous provision. (This was overlooked by the Court below.)

At the time Albert L. Purdy demanded these various mileage books of the Erie Railroad Company, he made no different demand, and it was conceded by his counsel on the trial, and understood by the Court, that Purdy must stand or fall upon these demands alone. (Record, pp. 98 and 99, fol. 200.)

As a part of the cross-examination of Purdy, it was shown by the deed of Charles H. Coster to the Erie Railroad Company delivered and recorded in November, 1895, and by the map put in evidence, that the continuous "line or lines" of said Erie Railroad Company, as operated by it, extended from Jersey City, in the State of New Jersey, through the States of New Jersey, Pennsylvania, New York, Ohio, Indiana, Illinois, to the City of Chicago. (Record, p. 99, fol. 201; map between pp. 110 and 111.

It is undisputed that a first-class ticket for a thousand miles would entitle the holder thereof to a continuous passage through these various States for one thousand miles, from any point at which the ticket might be purchased to the point of destination, and under the Act in question, and the demand of Purdy, the Erie Railroad Company, if it complied therewith, would be required to deliver to Purdy a mileage book which he could use to go from the point where he made the demand, Wellsville, N. Y., through the State of Pennsylvania and the State of New Jersey, to New York City, or from Wellsville westward through the various States traversed by the Erie Railroad Company to Chicago, as Wellsville is not a thousand miles from either New York or Chicago, and it would be optional with the plaintiff whether he would use such mileage book for a continuous passage along the line or lines of the Erie Railroad Company to New York or to Chicago.

The complaints in the first ten actions in which the judgment has been rendered are based upon these written demands and the statute specified in them, and seek to recover a penalty of fifty

dollars for the violation of the statute, in that the Erie Railroad Company failed to comply with Purdy's demand. (Record, pp. 4 to 24 inclusive).

Albert L. Purdy is a lawyer and former police justice living in Wellsville, and he continued the business of making demands and bringing actions until he had brought nineteen separate actions in the Supreme Court and two separate actions in the Court of a Justice of the Peace. (Record, pp. 25 to 48 inclusive).

The Court non-suited Purdy in the last eleven actions brought by him, because the Erie Railroad Company tendered him a book good within the State of New York, and subject to certain rules and regulations. (Record, p. 77, fol. 159; mileage book, pp. 78, 79, 80 and 81; also testimony, pp. 81 to 89; non-suit, p. 103, fol. 209).

The answers of the Erie Railroad Company in these actions are the same, as to the points involved in this Court. Those answers begin:

"The above named defendant, not waiving but insisting that "the complaint herein does not state facts sufficient to constitute a "cause of action against it, by Sprague, Moot, Sprague & Brownell, "its attorneys, answers said complaint as follows."

The answer then sets up various defenses, the substance of which is that the legislation in question does not apply to the Erie Railroad Company, and then it contains this paragraph:

"Sixth. It alleges that the line of the railroad owned and "operated by it extends from Jersey City in the State of New Jersey, "through the States of New Jersey, Pennsylvania and New York, "and in the State of New York connects with lines of railroad "leased by it, and operated and substantially owned by it, over "which it transports persons and property to Chicago, with numer-"ous lateral branches extending from the State of New York to "different States. And it alleges upon information and belief, that "the said act known as Chapter 835 of the Laws of 1896, is uncon-"stitutional and void, because it is in violation of the provision of "the Constitution of the United States which commits to Congress "the sole power to regulate commerce between the several States, "*and that it is unconstitutional and void because it is in violation of* "*various other provisions of the Constitution of the United States*, and of "the Constitution of the State of New York." (Record, pp. 49-50, fols. 102-103.) It will be seen these last words add another ground of defense common to both State and United States Constitutions;

and the only one that could have been so referred to was N. Y. Const., Art. VI, § 1 and U. S. Const., Art. XIV, § 1.

The remaining answers likewise insist upon the legal defense that the complaint does not state a cause of action, and plead the same defense of the unconstitutionality of the legislation in question under both the State and United States Constitutions. (Record, pp. 50 to 53).

The various actions were consolidated without prejudice to the rights of the parties thereto. (Record, pp. 61 to 69).

At the very beginning of the trial, a motion was made "to dis-"miss each of the actions consolidated in this action upon the "ground that the complaint in each of the actions fails to state facts "sufficient to constitute a cause of action for a penalty." (Record, p. 65, fol. 134).

The record does not show the argument urged in support of this motion, but it does disclose the exception to the refusal of the Court to grant it, and it does not disclose anything to show that the constitutional claim made in the answer was not urged upon the Court in behalf of the Erie Railroad Company from every possible point of view. There is nothing in the record to show that the claim that the legislation was unconstitutional, made in behalf of the Erie Railroad Company in the answer filed, was ever waived, or that it was not always insisted upon in every Court, everywhere.

The plaintiff, Purdy, offered in evidence the certificate of incorporation of the Erie Railroad Company filed November 14th, 1895, but it was not claimed that there was anything therein, or any provision of law in the State of New York, that would make the filing of such a certificate of incorporation a waiver of any constitutional or statutory right that the Erie Railroad Company might have to charge three cents a mile for the carriage of passengers. (Record, p. 65, fol. 135).

On the contrary, every complaint of Albert L. Purdy expressly alleges that the Erie Railroad Company "is authorized by law to "charge a maximum fare of more than two cents per mile and not "more than three cents per mile, to-wit: three cents per mile, and "which it does charge and did charge at the time herein set forth "* * * for the transportation of passengers." (Record, p. 4, fol. 8, etc).

Upon this point, the railroad statute of the State of New York provides:

"Every railway corporation may fix and collect the following "rates of fare as compensation to be paid for transporting any pas-"senger and his baggage * * * for each mile or fraction of a "mile." (Here certain railroads are excepted which a stipulation made on the trial showed did not apply to the Erie Railroad Company. (Record, pp. 65, 66 and 70, fols. 135 and 145.)

"5. In all other cases, three cents for every such mile or fraction "thereof." (Chap. 676, Laws 1892, § 37, pp. 1392-3.)

The mileage law therefore arbitrarily deprived us of one-third of our income for all persons able to buy transportation wholesale.

At the end of the trial, counsel for the Erie Railroad Company moved for a nonsuit in each action separately; first, upon the ground that the cause of action alleged in each complaint has not been proved; second, upon the ground that no cause of action has been proved in either of the actions consolidated in the action on trial. (Record, p. 102, fol. 207.)

The Court denied this motion as to the first ten cases, and an exception was noted to the denial of this motion. (Record, p. 103, fol. 209.)

The Court refused to direct a verdict in favor of the defendant, the Erie Railroad Company, as to the first ten cases, but did direct a verdict in favor of the plaintiff, Albert L. Purdy, as to the first ten cases, and an exception to this ruling was duly entered in favor of the Erie Railroad Company. (Record, pp. 103-104, fol. 210.)

An appeal was not taken to the Appellate Division of the Supreme Court, but the Court ordered these exceptions heard in that Court in the first instance. (Record, p. 104, fol. 210; p. 105, fol. 212.)

That Court denied the motion in behalf of the Erie Railroad Company for a new trial upon such exceptions, and ordered judgment in favor of Albert L. Purdy. (Record, p. 108, fol. 220, etc.)

No opinion was written by the Trial Court, or at the Appellate Division. (Record, p. 107, fol. 208; p. 108, fol. 219.)

Accordingly, the defendant, in accordance with long established practice, took an appeal to the Court of Appeals, in the usual form, to test the constitutionality of the statutes involved. (Record, p. 110, fol. 223.)

The Court of Appeals "considered that said judgment be in all "things affirmed, with costs as aforesaid, and stand in full force, "strength and effect," thereby necessarily determining that the

statutes in question are constitutional and enforceable as to the Erie Railroad Company. (Record, p. 111, fols. 226-227.)

OPINIONS OF COURT OF APPEALS.

The opinion of Cullen, J., in the Court of Appeals, shows in substance that, on the merits, he thought the Erie Railroad Company *estopped* from availing itself of its plea that the statute is unconstitutional. His reason was the filing of the certificate of incorporation of the Erie Railroad Company November 14, 1895, after the statute of 1895 took effect, but before the statute of 1896 took effect. He made the mistake of thinking the statute of 1896 one making changes alone favorable to railroads; otherwise he admits the railroad was entitled to succeed. He did not see that the judgment in effect necessarily compels the railroad company to make contracts (issue 1000 mile books), good forever, on which any holder can get an exchange ticket good for 1000 miles on the "line or lines" of the railroad company, no matter in what State that "line or lines" may be located; hence that question is not discussed in what is said of the interstate commerce constitutional question. He expresses a mere "doubt" as to whether one constitutional question was in fact raised below; after he has first discussed that question on the merits for some pages, and then decided it. The very case he cites as authority for his doubt, on examination admits the legal principle that should have removed this legal "doubt." The opinion nowhere considers whether the railroad company should be *estopped* from defeating the enforcement of an unconstitutional law at the suit of a "professional" for mere penalties; even if there may be cases where the *State* could insist upon an estoppel for well known equitable reasons. No case is cited where, as here, the principle of estoppel has been applied to a constitutional defense in a mere private suit of a person for penalties where there is no consideration, or evidence on which to rest such estoppel.

The far reaching and disastrous consequences of a doctrine which admits a statute is unconstitutional, yet permits a mere informer to enforce it for his private gain in penalties, contrary to the very constitution of the United States, which is the supreme law of the land, are not even referred to or in any way considered. Judging from the expressions of one of the Court of Appeals in the Beardsley

case, 162 N Y., 230, involving the statute of 1895 alone (which was admitted to be unconstitutional only because this court so held in Lake Shore vs. Smith, 173 U. S., 684,) the Court of Appeals failed to grasp the true import of the great questions of liberty of contract and equal rights and protection to all in person and property involved in litigations of this character.

ASSIGNMENTS OF ERROR.

The assignments of error are as follows, (Record, pp. 120–122):

"1. That the Supreme Court of the State of New York erred and "violated Article XIV. of the Constitution of these United States "in holding and determining that Chapter 1027 of the laws of the "State of New York for the year 1895, as amended by Chapter 835 "of the laws of the State of New York for the year 1896, entitled, "'An act in relation to the issue of mileage books by railroad "corporations,' did not and does not violate the provisions of "Article XIV., Subdivision 1, of the Constitution of the United "States, and in holding and determining that by the refusal of the "plaintiff in error to issue mileage books to the defendant in error "under said statute the plaintiff in error has forfeited ten separate "penalties of fifty dollars ($50) each to the defendant in error, and "the defendant in error is entitled to recover judgment therefor "against the plaintiff in error.

"2. That the Supreme Court of the State of New York erred and "violated Article I. of the Constitution of these United States in "holding and determining that Chapter 1027 of the laws of the "State of New York for the year 1895, as amended by Chapter 835 "of the laws of the State of New York for the year 1896, entitled, "'An act in relation to the issue of mileage books by railroad "corporations,' did not and does not violate the provisions of "Article I. of the Constitution of the United States, and in holding "and determining that by the refusal of the plaintiff in error to "issue mileage books to the defendant in error under said statute "the plaintiff in error has forfeited ten separate penalties of fifty "dollars ($50) each to the defendant in error, and the defendant in "error is entitled to recover judgment therefor against the plaintiff "in error.

"That the judgment of the Supreme Court of the State of New "York wherein the Supreme Court of the State of New York "erred and violated Article I. of the Constitution of these United "States and Article XIV., Subdivision 1, of the Constitution of "these United States, as aforesaid, was entered in the clerk's office "of the Supreme Court of the State of New York, in and for the "County of Allegany, on the 17th day of October, 1898, and "said judgment adjudged that said plaintiff in error, said Erie "Railroad Company, should pay to say defendant in error, said "Albert L. Purdy, ten separate penalties of fifty dollars ($50) "each for the violation of the statutes aforesaid; that said last-"named judgment rendered in the Supreme Court of the State of "New York, was duly affirmed by the Court of Appeals of said "State, it being the highest court of law and equity in said State in "which a decision could be had in said cause; that said judgment "should be reversed for the reasons following, namely:

"That the said judgment of the Supreme Court of the State of "New York is repugnant to Article I. of the Constitution of the "United States, which provides that 'the Congress shall have "power * * * to regulate commerce * * * among the "several States;' that the said judgment of the Supreme Court of "said State is also repugnant to Article XIV. of the Constitution of "the United States, which provides that no State shall 'deprive "any person of life, liberty or property without due process of law, "nor deny to any person within its jurisdiction the equal protection "of the laws.'

"There is error also in this, to wit: That by the record afore-"said it appears that the judgment aforesaid was given for the said "Albert L. Purdy against the said Erie Railroad Company, "whereas by the law of the land the said judgment ought to have "been given for the said Erie Railroad Company against the said "Albert L. Purdy; and the said Erie Railroad Company prays "that the judgment aforesaid, for the errors aforesaid and other "errors in the record and proceedings and the matters herein set "forth in said cause may be reversed and held for nothing, and "that said Erie Railroad Company may be restored to all things "which it may have lost by occasion of said judgment."

POINTS AND ARGUMENT.

I.

The motion of Albert L. Purdy, defendant in error, to dismiss or affirm, should be denied, because Federal questions are involved that are not "frivolous."

As I understand Rule 6 of this Court, under which this motion is made, that rule does not contemplate forcing counsel and clients to submit their cases without oral argument. If there is room for honest debate as to whether or not this Court has jurisdiction, and whether or not the Courts below have correctly determined the questions involved, the writ of error will not be dismissed. If it is reasonably clear that this Court has not jurisdiction, or that there is no merit in the question involved, then the Court should dismiss and will dismiss. In cases where this Court has already passed on the same question in the same litigation, and the State Courts have followed it, an attempt to obtain a further review by this Court would be a mere attempt to obtain delay, and in such cases this Court will dismiss the writ of error on motion.

So, too, where it is equally clear that the record does not present a Federal question, this Court should dismiss on motion. The cases sustain this position.

In The 'S. C. Tryon,' 105 U. S., 267, 270, Chief Justice Waite, in writing the opinion, in two sentences shows such considerations to be the turning point of motions like this. He says:

"The motion to dismiss must, therefore, be overruled, but on "looking into the record we are satisfied the appeal *was taken for* "*delay*. The only question presented arises on the findings of "fact."

So, in *Foster vs. Kansas*, 112 *U. S.*, 201, Chief Justice Waite, in disposing of a similar motion under Rule 6, said (p. 206):

"As the question of the constitutionality of the statute was "directly raised by the defendant, and decided against him by the "Court, we have jurisdiction, and the motion to dismiss must be "overruled: but, as every one of the questions which we are asked "to consider has been already settled in this Court, the motion to "affirm is granted."

Apply these principles here. At least one of the questions involved has been decided against the plaintiff in error, the Erie Railroad Company, by the State Courts, on its merits, but this Court has determined that question in favor of the plaintiff in error. As to that question, the statement of facts is itself an argument in favor of the plaintiff in error. Surely, without any evidence whatever that the plaintiff in error waived any of its constitutional rights by merely filing a certificate of incorporation, the plaintiff in error should not be estopped from questioning the constitutionality of an Act afterwards passed, when that Act is the only Act on which the defendant in error brought his action, or can sustain his recovery.

So, too, plaintiff in error should not be compelled to pay penalties for the mere refusal to deliver thousand mile tickets giving the holder thereof all the rights of a first-class passenger over its "line or lines." To order the plaintiff in error to pay judgments on such written demands, under such statutes, whatever may be said about the statutes and the opinions, is really to award a judgment in favor of the defendant in error under which he will be entitled to compel the plaintiff in error to issue mileage books for one thousand miles good for a first-class ticket over their "line or lines."

In addition to this, a bare inspection of the statutes involved shows the latter statute to be more onerous than the earlier one, and to be a complete "annihilation" of the first one. The learned Court of Appeals entirely overlooked its own decisions and the effect of this statute, in reaching a different conclusion.

This is enough and is an answer to this motion unless this Court cares to consider the merits of this case. If it does then we submit.

II.

The constitutionality of the statutes under the United States as well as the State constitution was put in question by every answer filed by the Erie Railroad Company, by proper motions and exceptions at the trial, and by proper notices of motion and notices of appeal, and the Court of Appeals having passed upon those constitutional questions upon the merits, and determined such questions adversely to the contention of the plaintiff in error, it is

too late for the defendant in error to deny that those questions have been brought to this Court for review.

Under the loose system of pleading now existing in New York and other Code States, it is enough if the Court on reading the pleading can fairly say what the party pleading claims to be a cause of action or a defense. Where the pleading deals with facts, it is more necessary that it should go into detail than it is where it deals with legal questions; consequently, if the defendant claims statutes to be unconstitutional in a case like this, it is enough that he demur on the broad ground that the complaint "does not state facts sufficient to constitute a cause of action." In the very nature of things, therefore, the plaintiff assumes the affirmative and necessarily pleads with more detail, while the defendant simply stands on the defensive, and may often rely upon the most simple denial or question of the plaintiff's rights.

The Code also goes farther and permits all the separate defenses to be inserted, whether legal or equitable in character, and whether consistent or inconsistent with each other. This being so, the defendant sued upon statutes for penalties may demur, or, as here, he may stand out, insisting on his first defense "that the complaint states no cause of action." This position of the defendant is alone sufficient to put in question the constitutionality of statutes on which the plaintiff relies, without alleging their unconstitutionality in set words.

In the Beardsley case (162 N. Y., 230), an examination of the record will show a demurrer on the ground that the complaint stated no cause of action was overruled; that the case was tried before the Court without a jury, and the Court ordered judgment for the plaintiff; that the defendant excepted thereto and took an appeal, and yet the Court of Appeals suggested no doubt about the constitutional question being up in that case, because on that record there could be no doubt, under the practice in New York, that the validity of the statute of 1895 was necessarily involved in the judgment based upon it.

The defendant in error says in his brief:

"The claim or allegation in the answer that the Act in question "is void because it is in violation of various other provisions of the "Constitution of the United States, is too indefinite to be considered." (Brief, p. 5.)

To sustain this statement, he cites *Maxwell vs. Newbold*, 59 *U. S.* 511, and *Messenger vs. Mason*, 77 *U. S.*, 507.

An examination of those cases shows very clearly that they are not in point.

Maxwell vs. Newbold is not a case dealing with an answer under the Code system of pleading. That case does not deal with an answer at all. That case does not consider the effect of the motions made and the exceptions taken at the trial in this case. That case is an authority for us, because it distinctly holds that constitutional questions raised and determined by the highest Court of the State can be reviewed by this Court on writ of error. That case was dealing with errors assigned, and it held one of them to be "too general and indefinite," but the Judge distinctly said :

"The questions raised and decided in the State Circuit Court point "altogether for their solution to the laws of the State, *and make no* "*reference whatever to the Constitution or laws of the United States.* Un- "doubtedly this did not preclude plaintiffs in error from raising the "point in the Supreme Court of the State, if it was involved in the "case as presented to that Court. And whether a writ of error "from this Court will lie or not depends upon the questions raised "and decided in that Court" (the highest State Court). 18 How., opinion, 516.

Messenger vs. Mason involved a statute, but it did not appear whether it involved a statute of the State or the Territory of Iowa. Because the certificate of the Court, and the record in the case, were silent on this vital point, and it did appear that a statute of the Territory was involved, the Court held there was nothing to show any statute except a statute of the Territory involved. A few words will show that this was the point there.

"One difficulty in bringing the case within this 25th section is, "that it makes no provision for the re-examination of a judgment "in a State Court *which upholds the validity of a statute of a Territory* "in contravention of the Constitution. * * * * The circum- "stance, therefore, that the Court below held the statute of the "Territory providing for partition of lands among tenants in com- "mon, valid, is of no importance in the case." (Opinion, p. 510.)

Clearly, there is a difference between the general claim of constitutional protection, which appears in an answer, and the more carefully worded assignments of error, or certificate, that shall

specify what it is that the United States Supreme Court is desired to review.

If my assignments of error in this case are too indefinite or general, the case just cited would apply and my writ of error would be dismissed, but this claim is not made in the brief served upon us. But we contend that this Court itself has recognized in the broadest way the general proposition that if it appears in any way fairly that the constitutionality of a specific statute has been drawn in question, and the protection of the Constitution of the United States has been claimed and has been denied by the State Courts, then upon proper assignments of error and a proper writ of error this Court will take jurisdiction and review. If this Court will not do so the Constitution of the United States will have little force or virtue in those sections of this country wherein lawyers and laymen alike are quite unacquainted with any artificial rules of practice, and where, therefore, they follow the codes of practice of their States and claim the protection of the Constitution of the United States by pleadings or by exceptions in the broadest possible manner.

In this case, under the law and practice of New York, if the answer of the Erie Railroad Company was too indefinite, the Courts were not at liberty to disregard it on the trial, but the remedy of the party was to have it made more definite and certain before the trial. In such cases the Courts assume that the failure to have it made more definite and certain is due to the fact that the party who had that right clearly understood what was claimed and was willing to go to trial and meet the broad claim made.

Greenfield vs. Insurance Co., 47 *N. Y.*, 430; *opinion, pp.* 436-437.

The learned Court below seems to have overlooked the consideration that these actions were brought for penalties upon statutes which are pleaded by chapter, as is provided by the Code of New York, and are, therefore, to be regarded as if set forth in the complaint word for word. Being so pleaded in the complaint, the answer must be read with reference to the complaint. This is not the first time that the Courts of New York State have overlooked so elementary a consideration in a case of my own. In a case where the question of whether the answer should be read in connection with the complaint was up, Finch, J., speaking for the Court of Appeals, said :

"This answer must be read in connection with the allegations "of the complaint."

Douglas vs. Haberstro, 88 *N. Y.*, 611; *opinion, pp.* 618.

The Court of Appeals in New York is frequently compelled to reverse, because the lower Courts have lost sight of the pleadings in disposing of the case.

In a recent case it was said:

"Statements, admissions and *allegations* in pleadings are always "in evidence for all the purposes of the trial of the action."

Holmes vs. Jones, 121 *N. Y.*, 461, 466.

Is it not apparent that the application of these principles to this case is that on the trial the Court could not shut its eyes to the claim of unconstitutionality under the United States Constitution made in the answer of the Erie Railroad Company?

Counsel for the Erie Railroad Company moving to dismiss "upon the ground that the complaint in each of the actions fails to "state facts sufficient to constitute a cause of action for a penalty," what point of law could have been urged in support of this motion if not the unconstitutionality of the statutes as pleaded by answer?

With the claim of unconstitutionality made in the answer of the Railroad Company before the Court, how could the Court understand this motion to really raise any other question except the question of the validity of the statutes in question? Could the Court understand the claim to be anything else than a claim that the statutes were invalid because they were unconstitutional? (Record, p. 65, fol. 134.)

It might have been better had some part of the argument in support of this motion appeared. Suppose, however, no argument was made, for the reason that the lower Courts of New York had already determined the statutes in question to be constitutional. Suppose that counsel for the Erie Railroad Company well knew that the Trial Term of the Supreme Court, and also the Appellate Division of the Supreme Court, had already determined these questions adversely to the claim of the Railroad Company, and, therefore, aside from raising the questions by a proper motion and exception, it would be useless to talk about them to an intelligent Court. In the brief for defendant in error, it is pointed out that this was the situation of affairs when this case was tried and when it was argued in the Ap-

pellate Division, and, therefore, it is suggested that the question was not argued until it reached the Court of Appeals.

It is true the question was not argued until it reached the Court of Appeals, but let it be remembered always that the question was raised and the claim was made in various ways that the statute was unconstitutional.

The motion for a nonsuit at the end of the case, on the ground that the cause of action alleged had not been proved, and no cause of action had been proved, necessarily raises the question of whether or not the statutes in question are valid or invalid, constitutional or unconstitutional, if that motion is to be referred back to the answer and the claim of the Railroad Company in the answer. (Record, p. 102, fol. 207.)

It matters not that a specific point was made that the legislation was unconstitutional because of the interstate commerce clause in the United States Constitution, because such a claim would not be a waiver of the broader claim made in the Railroad Company's answer and asserted in the broad motions which were expressly intended to reach and did reach the question of Purdy's right to recover at all.

In addition to this, when Purdy's counsel asked the Court to direct a verdict, and the Court did so, granting an exception to the Railroad Company, which it ordered heard with the others in the Appellate Division in the first instance (p. 104, fol. 211), the Court put the Railroad Company in the position of challenging the right of the plaintiff to recover a penalty upon any and every ground that might defeat his action. One of those grounds, and the very first one of those grounds, was the unconstitutionality of the statutes involved. And in our brief in the Appellate Division we said:

"The Court ruled that the legislation of this State was intended "to and did apply to the defendant, and did not violate the Consti- "tution of the United States, in which respect the Court supposed it "followed the other rulings to which we have referred, but the "defendant took its exception for use hereafter. The point not "decided in the other cases, but here presented for the first time, is "that this point is well taken *upon the facts now before this Court.*" (Brief for Railroad Company in Appellate Division, pp. 7-8.)

Of course that brief is not before this Court, nor does the practice of the State of New York provide for its becoming a part of the record for the consideration of this Court, but the point is that

under the exceptions taken at the trial this was a proper point to make in the Appellate Division and a proper point to make in the Court of Appeals. That this is so understood in the State of New York by the ablest Judges is seen in the opinion of Comstock, J., in *Belknap vs. Sealey*, 14 *N. Y.*, 143; opinion, 148, where that learned Judge says:

"But if the exception so made is general, as it was in this case, "I think it only raises the question whether upon the facts as found "*the law has been properly decided*, and that it does not present for "the consideration of an Appellate Court a special objection on the "ground of variance between the complaint or answer and the "proof."

This is particularly true of those cases in which the question raised is one of law alone, and, therefore, one which could not be altered or saved by evidence at the trial. Here, no possible evidence can be suggested that would have saved the statutes in question if they were claimed to be unconstitutional by answer, motion or exception.

This rule has been recently applied by the Court of Appeals in *Gerding vs. Haskin*, 141 *N. Y.*, 514, 521, where it is said:

"But where no grounds are specified for a nonsuit, the motion is "sufficient if it be apparent that the objection made to the plain- "tiff's recovery could not have been obviated if it had been par- "ticularly specified."

The brief for the defendant in error treats this question as one to be determined by the decisions and practice of the State Courts of New York. If it is to be so determined, the very case cited in the opinion of the learned Court in this case is an authority in favor of our position.

Speaking of a case where the unconstitutionality of the statute was not suggested by demurrer, answer, or by a motion to dismiss, or to nonsuit, or by an exception or a motion for a new trial on exceptions, the Court said:

"There was a motion for a re-argument of the case of *Brook-* "*man v. Hamill* (46 *N. Y.*, 636). The Court denied the motion, "and, in denying it, said: 'This case differs from that of *Vose v.* "*Cockcroft* (44 *N. Y.*, 415), upon which the appellant founds his "motion for re-argument. In that case *the objection that the com-* "*plaint showed no cause of action* was not taken either at Special or

"General Term, and the judgment was affirmed at General Term. "*In the present case the objection was taken at General Term, and the* "*judgment was there reversed.*"

Opinion *Delaney vs. Brett*, 51 *N. Y.*, pp. 82, 83.

Had the learned Court not overlooked this important principle of law, or its application to this case on the record presented, we think it would not even have suggested a "doubt" as to the constitutional question having been sufficiently raised in the Courts below. Certainly there is no evidence that the railroad company waived the constitutional claim it made in the very first answer it filed in these cases, and in every answer filed afterwards. On the contrary, the record is only consistent with that claim being vigorously asserted from first to last in the Court of Appeals. Having been vigorously asserted in the Court of Appeals, on a record putting in question Purdy's right of recovery on grounds broad enough to involve the validity of the statutes upon which he stands as the basis of his cause of action, we find the Court of Appeals writing an opinion of many pages on the merits, and determining that question adversely to us. Having so determined it, it then proceeds to "doubt" if the question has been raised on the strength of an authority that on examination proves to be an authority in favor of the proposition that it was sufficiently raised.

Is such a mere "doubt" sufficient to deprive this Court of jurisdiction after the Court of Appeals has considered and passed upon the merits of the constitutional question brought here for review and further consideration? Is the question a question to be determined solely from the standpoint of the decisions of the State of New York, or is it a Federal question?

THIS IS A FEDERAL QUESTION.

Recent decisions of this Court enable us to answer this question positively in favor of the plaintiff in error. This Court has recently held:

"But the question whether a right or privilege, claimed under "Constitution or laws of the United States, was distinctly and suffi- "ciently pleaded and brought to the notice of a State Court, *is itself* "*a Federal question*, in the decision of which this Court, on writ of

"error, is not concluded by the view taken by the highest Court of "the State. *Neal v. Delaware*, 103 *U. S.*, 370, 396, 397; *Mitchell v. "Clark*, 110 *U. S.*, 633, 645; *Boyd v. Thayer*, 143 *U. S.*, 135, 180.")

Quoted from opinion Gray J., in *Carter v. Texas*, 177, *U. S.* 442, 447.

This, too was said of a case where the only claim to the protection of the Constitution of the United States was in these words:

"That such discrimination is a denial to him of the equal "protection of the laws, and of his civil rights guaranteed by the "Constitution and laws of the United States." (P. 444.)

Clearly, after the Court of Appeals had discussed this question on the merits and determined it against the defendant in error, it should not now be held that it was not sufficiently raised for such discussion, because that Court closed the discussion by suggesting a mere "doubt" as to the question being then up which it discussed and determined.

This is the view of this Court as we understand it, for in the most recent case we can find on the subject it is said:

"In regard to the objection that even Carhart has raised the "question too late, we think it is without foundation. He raised it "in the Supreme Court, and that Court decided it against him, not "on the ground that he had not raised it in the lower Court, but on "its merits, and for the reason that in the judgment of the Supreme "Court the statute was a valid and constitutional exercise of the "legislative powers of the State."

Sully vs. American National Bank, 178, *U. S.*, 289; *opinion, Peckham, J.*, 298.

And these late cases in this Court do no more than to recognize the rule applied in its earlier decisions. Those decisions have always treated the constitutional question as raised if an inspection of either pleadings, instructions, or any other part of the record, showed any objection broad enough to fairly disclose to the Court that the legislation was claimed to be unconstitutional under the United States Constitution. As I understand the decisions of this Court, they hold it is enough if either of three things appear by the record.

1. That the protction of the Constitution was *claimed* in the pleading; or,

2. That the protection of the Constitution was invoked by a motion for a non-suit, or some other appropriate motion, or by an exception to the direction of a verdict, or an instruction of the Court; or,

3. That some statute or proceeding was involved, and the citizen denied its binding force upon him, but the court held against him, thus in effect determining that the statute was constitutional, when upon its face it appeared to be unconstitutional, although the record fails to show the Constitution was mentioned in pleadings on the trial, or until after the judgment was rendered.

These propositions rest upon the assumption that all courts are presumed to know and to apply the Constitution in accordance with the very oath taken by every judge of every state and national court.

In *Bridge Proprietors vs. Hoboken*, 1 *Wall*, 116 Miller, J., said:

"It is objected, however, * * * that the pleadings do not "in words * * * * point out the *special clause of the Constitu-* "*tion* supposed to render the act invalid. It would be a new rule in "pleading and altogether superfluous, to require a party to set out "specially the provision of the Constitution of the United States on "which he relies for the action of the Court in the protection of his "rights. If the courts of this country, and especially this Court, "can be supposed to take judicial notice of anything without plead- "ing it specially, it is the Constitution of the United States."

The same able Judge, speaking for this Court in the leading case of *Murdock vs. Memphis*, 87 *U. S.*, 590, said:

"It has been many times decided by this Court * * * "that if it appears from the record that the plaintiff in error raised "and presented to the Court, by *pleadings*, prayer for instruction, *or* "*other appropriate method*, one of the questions * * and the "Court ruled against him, the jurisdiction of this Court attached, "and we must hear the case on the merits."

The defendant in error recognizes this case as a leading case.

In *Kaukauna Co. vs. Green Bay, etc., Canal Co.*, 142 *U. S.*, 254, proceedings were taken in a State Court under a State statute enacted before the adoption of the Fourteenth Amendment to the United States Constitution, and those proceedings, after the Fourteenth Amendment took effect, being upheld against the corporation, it insisted that such decision denied it its constitutional rights, and

sued out a writ of error to review the decision of the State Court. Its pleadings were not drawn with a view to the case going to this Court, and, therefore, the pleadings did not specifically raise the constitutional question, nor did the record clearly show that it was raised, except that the decision itself was necessarily adverse to the constitutional rights of the corporation. In its opinion this Court said (p. 269):

"Notwithstanding the inhibition of the Constitution *is not dis-*
"*tinctly put in issue by the pleadings, nor directly passed upon in the*
"*opinion of the Court*, it is evident that the Court could not have
"reached a conclusion adverse to the defendant company without
"holding, either that none of its property had been taken, or that
"it was not entitled to compensation therefor, which is equivalent
"to saying that it had not been deprived of its property without
"due process of law. *This Court has had frequent occasion to hold that*
"*it is not always necessary that the federal question should appear affirm-*
"*atively on the record, or in the opinion, if an adjudication of such*
"*question were necessarily involved in the disposition of the case by the*
"*State Court.* (*Willson vs. Blackbird Creek Marsh Co.*, 2 *Pet.*, 245;
"*Armstrong vs. Athens County*, 16 *Pet.*, 281; *Chicago Life Insurance*
"*Co. vs. Needles*, 113 *U. S.*, 574; *Eureka Lake Co. vs. Yuba County*,
"116 *U. S.*, 410.")

In *Meyer vs. Richmond*, 172 *U. S.*, 82, the claim that the charter and ordinances involved were unconstitutional was first made on a motion to set aside a judgment. As this claim was not made until after the judgment was rendered, and, therefore, could not have been made in the pleadings in the case, it was insisted that this Court could not review the decision of the Court of Appeals of Virginia, because the unconstitutionality of such charter or ordinances had not been brought in question by the pleadings, or by anything done on the trial of the action. In passing on this claim this Court said (p. 91):

"The jurisdiction of this Court is challenged. The defendants
"in error claim that 'the declaration shows no point is therein
"raised which demanded the consideration by the Court of any
"constitutional question,' and they insist further that 'if it were in-
"tended to raise the question that the charter and ordinance were
"unconstitutional, and in consequence thereof plaintiff was de-
"prived of his property without due process of law, the same should

"have been specially set up as claimed by apt language *in the* "*declaration*, so as to bring the question to the attention of the Court "when it had to pass on the demurrer.' This certainly was not "done, and *if* it was an indispensable condition to the jurisdiction "of this Court it has none.

"But it was done subsequently, as we have stated, and, what- "ever the ground of the Court's ruling on the demurrer and on the "first motion to reverse that ruling, the second motion was un- "equivocally based on the invalidity of the city ordinance because "of its asserted conflict with the Fourteenth Amendment of the Con- "stitution of the United States, and the Court's ruling necessarily "responded to and opposed the grounds of the motion—neces- "sarily denied the right specially set up by him under the Consti- "tution."

In *Chicago, R. & I., etc., R'y vs. Sturm*, 174 *U. S.*, 710, the action was brought against a railroad employee in a justice's court in Kansas. A continuance was asked because judgment had gone against the defendant in Iowa under a garnishee and that case was pending in Iowa on appeal. The continuance was denied and the Kansas court also rendered judgment against the defendant. A new trial was moved for, and on that motion the claim was first made that the Constitution of the United States required that full faith and credit be given to the Iowa judgment. The motion for a new trial was denied there as it was denied in this case by the Appellate Division. The Court of Appeals of Kansas affirmed that judgment. On writ of error this Court assumed that the question was sufficiently raised. This Court said of the defendant's attempts to get a continuance, and, later, to get a new trial (p. 718):

"The plaintiff in error did all it could and submited only to "the demands of the law."

The plaintiff in error is not estopped from urging the Constitution as a defence to these penal actions.

This follows from what has been said. The State and its courts have no interest in raising such an estoppel for defendant in error. The State and its courts have not been misled by plaintiff in error. Plaintiff in error has not deprived them of their rights. It has complied with all valid laws of the State. Valid laws of the State entitle the Erie Railroad Company to its full fare from every passenger. Those laws conflict with the special law Purdy seeks to

enforce. That special statute is unconstitutional. The Erie Railroad Company did not mislead Purdy but in over twenty different answers the Erie Railroad Company set up and "insisted" upon this claim as a defense. Where, then, is the conduct of the plaintiff in error upon which defendant in error can predicate an estoppel? It is not in the answers, the trial, the motions, the exceptions, the motion for a new trial, or the appeal. This claim of unconstitutionality runs through them all. Is it in the certificate of incorporation? That might help the State if it were a party to this action if it clearly showed an intent to waive all objections to this illegal special statute. But it shows no such intent. And the State is not a party here, is not interested in this suit. But the State and its courts are bound to uphold the United States Constitution, the "supreme law" of our land. The State is asked to do that by the plaintiff in error as a defense to a void act. Can the State or its courts refuse to do it? Should they enforce such void act contrary to the supreme law urged as a defense? Can they say the defendant in error can estop them from doing it? Can Purdy estop the Erie Railroad Company from asserting this defense? What consideration has the Erie Railroad Company ever received from Purdy for waiving this defense? It is said such an estoppel "never takes "place when one party did not intend to mislead and the other is not actually misled." (*Anderson's Law Dict.* "*Estoppel*," and authorities there cited.) Where then is the basis for an estoppel in favor of defendant in error? If the penal statute is invalid and void because it is unconstitutional within the United States Constitution as is held in *Beardsley vs. The New York, Lake Erie & Western R. R. Co.*, and *Lake Shore, etc., vs. Smith* 173 *U. S.*, 684, there is no evidence that the Erie Railroad Company has ever intentionally waived its right to have such statute pronounced unconstitutional and void as to the Erie Railroad Company. The evidence of such a "surrender" or waiver should be nothing less than some document or act that can bear no other construction. This case is clearly distinguishable from cases where the State reserves to itself a certain portion of the income of a corporation as a condition of granting such corporation some right, privilege or franchise. In those cases the State itself creates the corporation for a consideration and the courts of the State properly uphold the right of the State to that consideration. They estop the corporation from withholding it. Here the State is not involved. It has no interest in estopping the Erie Railroad

Company from asserting a constitutional defense to Purdy's action. By filing a certificate of incorporation the Erie Railroad Company cannot be held to have assented to the legislation in question, whereby certain favored individuals are permitted to withhold from the Erie Railroad Company what all others are legally obligated to pay the Erie Railroad Company under like circumstances, because the State is in no way benefited by such confiscation of the income of the Erie Railroad Company for the sole benefit of such favored individuals without due process of law, within either the State or United States Constitution.

This is a penal action affecting corporations of public character and public interest, and it will be unjust to railroad corporations competing with each other to hold that acts of the legislature which the legislature has no power to pass, and is prohibited from passing by both State and United States Constitutions, are, nevertheless, enforceable by estoppel as against all corporations organized after its passage. The Erie Railroad Company contends that such a rule of law is not warranted by authority, and should not be established, because it will deny the "equal protection of the laws" to all corporations, contrary to the provisions of the Fourteenth Amendment of the United States Constitution.

The authorities and the quotations made from them very clearly show that it is enough that the record in this case shows that the Erie Railroad Company did claim that the act in question was unconstitutional, by the very first pleading filed. That pleading shows that that claim was not confined to any one provision of the Constitution, but that it was made as broad as the "various" provisions of the Constitutions of the State of New York and of the United States. The record shows nothing to show that that claim was ever waived, or limited, but so far as it shows anything, it shows that that claim was insisted upon at the trial and upon the motion for a new trial on exceptions at the Appellate Division. That particular stress was laid on the interstate provision in the answer, and Courts would not limit the Erie Railroad Company thereto when it asserted the broader claim, too, as it did.

The record shows that this claim that the act was unconstitutional was necessarily determined against the Erie Railroad Company by each of the Courts in which it was made. The rules of the Supreme Court of the United States now provide that it may read the opinion of the Court of Appeals of the State of New York to see

whether the question was raised in that Court. It clearly appears from the opinion of that Court, and its simple affirmance of the decisions of the Courts below, that that Court affirmed their decisions knowing that it was denying the Erie Railroad Company its constitutional rights, which it had claimed from the beginning by its answer. It clearly appears that the Erie Railroad Company is denied the equal protection of the laws by the opinion handed down in that Court in the Beardsley case. We think, too, it clearly appears by the opinion in the Beardsley case and in this case that the opinion of this Court in the Smith case was not approved of by the Court of Appeals of the State of New York, but was followed by compulsion when followed at all.

With these facts clearly presented, it must be apparent that the Erie Railroad Company has claimed the protection of the United States Constitution, and has been denied the protection of that Constitution by the decisions rendered in this case.

Counsel for the Erie Railroad Company would not put in the answer they did after the Beardsley case was decided and then waive the very defense thus pleaded for "use hereafter," to quote our brief in the Appellate Division. Purdy's counsel defied that claim by himself moving for the direction of a verdict and obtaining the direction of a verdict. He took that directed verdict despite Erie Railroad Company's pleaded and established defense and the exception to the direction of that verdict. The Erie Railroad Company challenged that direction and Purdy's right to any verdict by a motion for a new trial, on the exception to such direction. What the Erie Railroad Company said at the Appellate Division is unimportant, but it clearly appears that the Erie Railroad Company there claimed that the act was unconstitutional under the United States Constitution and that its exception was intended to and did preserve that question for review. That claim was set forth in specific, clear language, which we have quoted, and which again notified Purdy that he had to meet and defeat that claim. The Appellate Division ignored this claim of the Erie Railroad Company, and thereupon it was again set forth with elaboration, and re-enforced with the decision in the Smith case. Thereupon, the Court of Appeals of the State of New York said (reluctantly) that it would follow the Smith decision in the Beardsley case, but that it would not follow it in this case for reasons given. Those reasons, aside from a "doubt," are reasons dealing wholly with the right of the Erie

Railroad Company to avail itself of its claim that the act in question is unconstitutional. That opinion is summed up in the one word "estopped." The constitutions and the general laws were overlooked or the Erie Railroad Company would not be considered "estopped" by a special statute in conflict with them. Plaintiff in error has the right to urge the "higher law" as its defense in this action. Plaintiff in error has urged that defense from the beginning by answer, and motion, and appeal. It still urges that defense. After reflection, I am clear that the reasons assigned for denying the Erie Railroad Company the protection of the Constitution of the United States are not tenable. Down to the present time they lack the support of any authority. The opinions handed down by the New York Courts rest upon the repealed, the "annihilated," the "blotted out" Statute of 1895. They cannot rest on that foundation.

THE CORPORATION RIGHTS.

I should have had printed in the record the certificate of incorporation and the deeds that were in evidence in the Trial Court had I supposed the claim made, and sustained by the Court of Appeals, would ever be made in any court.

But consideration shows the apparent immateriality of all that evidence upon this issue. What would it show? The certificate of incorporation under Chapter 688 of the Laws of 1892, Sections 3 and 4, would simply show a new corporation organized November 14, 1895, to acquire "all the rights, privileges and franchises which at "the time of such sale belonged to or were vested in the corporation last owning the property sold, or its receiver." The new corporation, however, is expressly required to be "subject to all the "provisions, duties and liabilities imposed by law on such corporations."

N. Y. Stock Corporation Law, Section 3, *subdv.* 4, *Chap.* 688, *Laws of* 1892, pp. 1825–6.

The deeds to the new corporation convey the property to it, and its certificate of incorporation gives it the corporate rights of any corporation formed at that time. Would the corporation have any other corporate rights than those acquired by some other corporation formed at that time? Apparently it would not have any other corporate rights. Apparently it would have such property

rights called "franchises" as were attached to the property conveyed to it. For instance, the railway and terminal facilities acquired by it in New York or Buffalo might carry with them, as an incident thereto, certain rights and franchises in the streets or public places of those cities. But would it have the corporate rights or powers of the old corporations that preceded it divorced from rights thus attached to property the old corporations had owned? In other words, would the soul, so to speak, of the old corporation pass into the new corporation, and would the new corporation be a continuation of the old corporation? If so, the new corporation could question the constitutionality of the Act of 1895. Apparently this question has been already answered adversely to the Erie Railroad Company.

In Metz vs. B. C. & P. R. R. Co., 58 *N. Y.*, 61, Grover, J., said of such a case (p. 66):

"Indeed, were this so, the property purchased would be liable "to all the existing debts of the corporation, and thus the mortgage "security, and the rights of the purchaser, might be entirely de-"feated. I think it clear that the *corporation* did not vest in the "purchasers, and that they did not become stockholders or corpora-"tors in the *pre-existing* corporation."

In *People ex. rel. Schurz vs. Cook*, 110 *N. Y.* 443. Peckham, J., said (p. 449):

"We think it is also plain that under the reorganization acts "above mentioned, when the purchasers at the foreclosure sale "undertook to reorganize under those acts, and for that purpose to "file in the Secretary's office a certificate upon the filing of which "they become a body politic and corporate, *the corporation thus "formed is a new and entirely different one* from that whose property "and franchises the purchasers may have bought under the fore-"closure proceedings. * * * The right to be a corporation "which the old corporation had was not mortgaged, and was not "sold, and did not pass to the purchasers."

In *Covington, etc., Turnpike Co., vs. Sandford*, 164 *U. S.*, 578, Harlan, J., giving the reasons for a unanimous reversal of the Court of Appeals of Kentucky, quoted with approval from previous decisions of that Court which hold (p. 587):

"In the absence of express statutory direction, or of an equiva-"lent implication by necessary construction, provisions in restriction

"of the right of the State to tax the property *or to regulate the affairs* "*of its corporations*, do not pass to new corporations succeeding by "consolidation or by purchase under foreclosure to the property and "ordinary franchises of the first grantee. * * * The same princi- "ples should be recognized when the claim is of immunity or exemp- "tion from legislative control of tolls to be exacted by a corporation "established by authority of law for the construction of a public "highway. It is of the highest importance that such control should "remain with the State, and it should never be implied that the "legislative department intended to surrender it."

So here, it should not be implied that the plaintiff in error intended to surrender its constitutional right. So here, it should not be implied that the plaintiff in error intended to surrender its right to a full fare from each passenger under general laws that are constitutional, and to yield one-third of such fare to each passenger who would force the plaintiff in error to sell tickets wholesale under the unconstitutional statutes in question.

If the principles laid down in the cases to which we have referred are to be applied to the Erie Railroad Company, apparently it can never escape from the decision made in the opinion handed down by the Court of Appeals of the State of New York. Apparently, for all time all Courts of the State of New York will enforce this unconstitutional statute against the Erie Railroad Company or make it pay penalties thereunder to persons like the defendant in error, the constitution, general statutes and decisions to the contrary notwithstanding.

AUTHORITIES CITED BY DEFENDANT IN ERROR ON QUESTION OF JURISDICTION.

Nor do the cases cited by defendant in error require a different conclusion, or lay down a different rule. He cites *Dewey vs. Des Moines*, 173 *U. S.*, 193, and *Keokuk & H. B. Co. vs. Illinois*, 175 *U. S.*, 626, as conclusive on this question.

In the Dewey case, Peckham, J., said:

"Parties are not confined here to the same arguments which "were advanced in the Courts below upon a Federal question there "discussed. Having, however, raised only one Federal question in

"the Court below, can a party come into this Court from a State "Court and argue the question thus raised, *and also another not con-* "*nected with it*, and which was not raised in any of the Courts below, "*and does not necessarily arise on the record*, although an inspection "of the record shows the existence of facts upon which the question "might have been raised? * * * In such case, if the Court be- "low denied the right claimed, it would be enough; or if it did not "in terms deny such right, *if the necessary effect of its judgment was to* "*deny it, then it would be enough.* But the denial, whether expressed "or implied, must be of some right or claim founded upon the "Constitution or the laws or treaties of the United States which had "in some manner been brought to the attention of the Court below. "*The record shows nothing of the kind in this case.*" (Opinion, pp. 198, 200.)

Further comment is unnecessary, because we here seek the application of the principles recognized in this opinion.

In the Keokuk case, Chief J. Fuller said:

"Although no particular form of words is necessary to be used "in order that the Federal question may be said to be involved, "within the meaning of the cases on this subject, there yet must be "something in the case before the State Court which at least would "call its attention to the Federal question as one that was relied on "by the party, and then, if the decision of the Court, while not "noticing the question, was such *that the judgment was by its necessary* "*effect a denial of the right claimed or referred to, it would be sufficient.*" (Opinion, p. 634.)

Of the numerous cases cited by defendant in error on this point, the remainder are easily shown to be without application here. Some are like *Morrison vs. Watson*, 154 *U. S.*, 111, where it is said that the constitutional question was "never raised." Some are like *Chappell vs. Bradshaw*, 128 *U. S.*, 132, and *Miller vs. State*, 153 *U. S.*, 535, where the constitutional question was never raised until a motion for a re-argument was made in the highest Court of the State.

Some are like *Walker vs. Sauvinet*, 92 *U. S.*, 90, where the constitutionality of an Act under the State Constitution was held not subject to review by the United States Supreme Court.

Some are like *Brown vs. Commonwealth*, 141 *U. S.*, 573, a criminal case in which no claim was made under the United States Constitution in any way, shape or manner, until after the prisoner had

been tried and convicted, and then it was too late to claim that the Court that convicted him had denied his constitutional rights to him, when he had not even claimed them.

Without going more into detail, it is enough to say that all these cases concede that in some manner the protection of the United States Constitution must be claimed by the defeated party, but they all concede that it is enough if that claim is fairly made by pleading, motion, exception, or in any other appropriate form. And they all stand upon the principle, also, that if the Court below passed upon the constitutional question on the merits, it cannot be urged in this Court that the constitutional question was not raised so as to entitle it to be passed upon upon its merits.

III.

The Erie Railroad Company is entitled to succeed on the merits of the questions brought here for review by the writ of error.

We might well risk this point on the facts and the decision in *Lake Shore vs. Smith*, 173 *U. S.*, 684. If this Court cares to go further, however, we will further examine this question on the merits.

(a) *The Court below overlooked important decisions and facts in holding "all" of the changes wrought by the Act of* 1896, *"are more favorable to the railroad company;" and the Court conceded if this was not so the Erie Railroad Company was entitled to succeed.*

This appears from the opinion in which it is said:

"The statute of 1896 was passed subsequently to the incorpora-
"tion of the defendant, and if the statute increased the burden
"imposed on the defendant by the Act of 1895, as to such additional
"burden it would be invalid. But a comparison of the two acts
"shows that *all* the modifications of the statute of 1895 effected by
"the statute of 1896 are favorable to the railroad company."

Here follows an analysis of the Act of 1896 as compared with the Act of 1895, intended to show that the Act of 1896 is more favorable to the railroad company. The analysis made strikes a railroad lawyer with astonishment, if he is familiar with the successful efforts of the Commercial Travelers' Association, to replace

the statute of 1895 with that of 1896. Railroad opposition did not prevent the change. The history of the populistic moves of Gov. Pingree of Michigan, over these mileage acts and litigations is also instructive on this point. (34 Am. L. R., 39 to 41.) This struggle over this change shows the interested parties knew which would be favored by the proposed change.

1. The features added in 1896 were not "all" "favorable" to the railroad. The Act of 1895 required mileage books to "issue," but there was no provision in the Act of 1895 requiring the Erie Railroad Company to keep such books for sale at any particular ticket office. By the Act of 1896, however, they were required to be "kept for sale by such corporation at every ticket office of such corporation in an incorporated village or city."

But for this specific language, if the railroad corporation had issued mileage books and had kept them for sale in its great offices in the great cities, it might well have urged that it should not be subject to a penalty for not keeping such valuable books for sale at every small branch office in a city, or every office in the smallest incorporated village, where there would be no demand therefor.

2. The Act of 1895 did not provide where application should be made for such a book, or how soon after application therefor the railroad should be required to provide it. Therefore the railroad could very well have claimed the traveling public must make application for these valuable books a reasonable length of time beforehand, to enable it to procure them from headquarters, where they were kept.

But by the Act of 1896 any construction of this kind was prevented, by requiring that in "every ticket office" the mileage book "shall be issued *immediately* upon application therefor."

This case is a very apt illustration of the importance of this provision, because Purdy's right of action immediately accrued day by day, because the Erie Railroad Company was required to issue the mileage book to Purdy "immediately."

3. Again, within all the decisions of the courts, the railroad companies certainly had the right to insist that the holder of a mileage book, under the statute of 1895, should use it up in a "continuous" trip.

Hill vs. S. B. & N. Y. R. R. Co., 63 *N. Y.*, 101.

Auerbach vs. N. Y. C. & H. R. R. R. Co., 89 *N. Y.*, 281, 284.

This right was left unimpaired by the Act of 1895, which only gave the "holder" the right "to travel 1,000 miles on the line or "lines of such railroad."

This right of the railroad company was a very valuable one, and this right alone would have prevented local passengers from buying mileage books for short trips from place to place. If mileage books could only be used for a "continuous" trip, but few would be sold. Whether the "holder" of such a book could assign it or not was, therefore, unimportant, because the railroads could make such books practically worthless by requiring the "holder" to use it up in a "continuous" trip or find his remainder of the book worthless.

Under the Act of 1896, this right was taken away from the railroad company, and provision was made instead by which the mileage book should have "one thousand coupons attached "thereto. * * * The holder of any such mileage book shall "be entitled upon surrendering at any ticket office on the line or "lines of such railroad, coupons equal in number to the number of "miles which he or any member of his family or firm, or a sales-"man of such firm, wishes to travel on the line or lines of such "railroad, to a mileage exchange ticket therefor."

By this language it was first made possible for any person making numerous short trips to buy such a mileage book and use it for such short trips.

4. The Act of 1895 makes no provisions as to the rights of the holder of such mileage book, except that he may "travel one "thousand miles on the line or lines of such railroad."

If the corporation saw fit to require such a traveler to travel by some particular train, or in some particular car, as is done with the holders of excursion or other cheap tickets, there is nothing in the act denying the right of the corporation so to do.

Nolan vs. N. Y., N. H. and H. R. Co., 41 *N. Y., Sup'r Ct.*, 541.

So, too, the words "good this date only" would have compelled the holder to use it at once.

Elmore vs. Sand, 54 *N. Y.*, 512.

In the Act of 1896 these points are covered, and it is further provided:

"Such mileage exchange ticket shall entitle the holder thereof "* * * to the same rights and privileges in respect to transpor-

"tation of person and property to which the highest class ticket "issued by such corporation would entitle him."

The highest class ticket issued by such corporation would entitle him to travel over the lines of the Erie Railroad Company in any of the States through which it passes. The highest class tickets permit "stop-overs." Under this act the traveler could buy a mileage book in New York City and immediately exchange it for an exchange ticket for one thousand miles, upon which he would be entitled to travel to Chicago, stopping by the way, if the act is construed according to its precise requirements, because the highest class ticket issued by such corporation would entitle him to travel to Chicago or anywhere on the Erie Railroad Company's lines. Or he could get any number of short exchange tickets, one at a time, for his coupons, until he used them all up, no matter how many years that took, or how many different exchange tickets.

5. There is nothing in the Act of 1895 in any way preventing the Railroad Company from stating a reasonable limit of time within which such mileage books should be good. Therefore the Railroad might insist that travel over its lines "was to be continuous after it was commenced."

Hamilton vs. N. Y. C. R. R. Co. 51 *N. Y.*, 100, 104.

If the holder of such a mileage book got off and afterwards undertook to continue his trip on another train, he could be compelled to pay his fare.

The Courts go further and permit the Railroad to limit time within which its ticket shall be good, in the absence of a statute to the contrary.

Hill vs. S., B. & N. Y. R. R. Co., 63 *N. Y.*, 101.

They can compel the passenger to use the ticket the same day.

Elmore vs. Sands, 54 *N. Y.*, 512.

On such a ticket "the plaintiff was bound to a continuous "passage over the defendant's road; that is, the plaintiff could not "enter one train of the defendant's cars, and then leave it and "subsequently take another train and complete his journey."

Auerbach vs. N. Y. C. & H. R. R. R. Co., 89 *N. Y.*, 281, 284.

But the Act of 1896, makes this provision to prevent such a rule from applying:

"Such mileage books shall be good until all coupons attached "thereto have been used."

Such books are thus made good forever. The Railroad Company is compelled to make any number of contracts good forever. The rise in prices now going on might bankrupt the road in time were it compelled to make and have out enough such contracts. It might find it impossible to meet such contracts at Dewey excursions and penalties might ruin it if a small road. Without the addition of this burden the act would not be so clearly unconstitutional. In the case of *Smith vs. Lake Shore* the decision turned in part on the requirements that the book should be good for "two years."

This provision is certainly more onerous than anything contained in the Act of 1895. I think the Court below must have overlooked this provision, and many of these considerations, in reaching the conclusion that "all" the modifications of the Act of 1896 "are favorable to the Railroad Company." It follows that the Act of 1896 is unconstitutional.

(b) *The Act of* 1895 *was "blotted out and annihilated" by the Act of* 1896; *therefore the Act of* 1895 *cannot sustain this judgment.*

The opinion of the Court below assumes that the Act of 1895 and the Act of 1896 can be treated as if the Act of 1895 continued in force after the Act of 1896 was enacted. The Court thus overlooked the legal principle that the later act incorporates and merges into it every single provision of the Act of 1895, and adds thereto the important provisions, among others, to which we have called attention. For the purpose of making this apparent at a glance, I here print the two acts side by side, italicizing the Act of 1896 as to all additional words found in it.

CHAPTER 1027.

AN ACT IN RELATION TO THE ISSUE OF MILEAGE BOOKS BY RAILROAD CORPORATIONS.

Became a Law June 15, 1895, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

SECTION 1. Every railroad corporation operating a railroad in this State, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than

CHAPTER 835.

AN ACT TO AMEND CHAPTER TEN HUNDRED AND TWENTY-SEVEN OF THE LAWS OF EIGHTEEN HUNDRED AND NINETY-FIVE, ENTITLED, AN ACT IN RELATION TO THE ISSUE OF MILEAGE BOOKS BY RAILROAD CORPORATIONS.

Became a Law May 22, 1896, with the approval of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section one of chapter ten hundred and twenty-seven of the laws of eighteen hundred and ninety-five is hereby amended so as to read as follows:

three cents per mile, shall issue mileage books entitling the holder thereof to travel one thousand miles on the line or lines of such railroad, for which the corporation may charge a sum not to exceed two cents per mile. Any railroad corporation which shall refuse to issue a mileage book as provided by this section, or in violation thereof, to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to which such refusal is made; but no action can be maintained therefor unless commenced within one year after the cause of action accrued.

SEC. 2. This act will take effect immediately.

SECTION 1. Every railroad corporation operating a railroad in this State the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile, *and which does charge a maximum fare of more than two cents per mile,* shall issue mileage books *having one thousand coupons attached thereto,* entitling the holder thereof, *upon complying with the conditions hereof,* to travel one thousand miles on the line or lines of such railroad for which the corporation may charge a sum not to exceed two cents per mile. *Such mileage books shall be kept for sale by such corporation at every ticket office of such corporation in an incorporated village or city, and shall be issued immediately upon application therefor. The holder of any such mileage book shall be entitled, upon surrendering, at any ticket office on the line or lines of such railroad, coupons equal in number to the number of miles which he or any member of his family or firm, or a salesman of such firm, wishes to travel on the line or lines of such railroad, to a mileage exchange ticket therefor. Such mileage exchange ticket shall entitle the holder thereof without producing the mileage book upon which such exchange ticket was issued, to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. Such mileage books shall be good until all coupons attached thereto have been used.* Any railroad corporation which shall refuse to issue a mileage book as provided by this section, or, in violation hereof, to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to which such refusal is made; but no action can be maintained therefor unless commenced within one year after the cause of action accrues.

SEC. 2. This act shall take effect immediately.

See how heavy are the additions made by the last italicised words. Are they "all" changes "more favorable to the Railroad "Company?" If not, the Court below admitted we were entitled to succeed in our defense.

It is very clear that the later act absorbs and wipes out the earlier act, which is thus merged into it, and therefore there is no authority except the later act under which Purdy can maintain this action against the Erie Railroad Company. Purdy so understood the matter. He does not bring any of his actions under the Act of 1895. His causes of action did not accrue until after the Act of 1896 was the only law on the subject. Every demand he made for a mileage book from June 26, 1896, down was a written demand "under Chapter 1027 of the Laws of 1895 *as amended* by "Chapter 835 of the Laws of 1896." (P. 147, fol. 586.)

In the brief of Purdy's able counsel in the Court of Appeals he said:

"In the ten causes of action upon which this recovery was had, "plaintiff had made his demands for mileage books upon the "defendant June 26, 1896; June 29, 1896; July 1, 1896; July 3, "1896; July 10, 1896; August 12, 1896; August 15, 1896; August "22, 1896, and August 27, 1896." (Pp. 2 and 3.)

It will thus be seen that every recovery in this case was a recovery of a penalty for the violation of the Statutes of New York as they stood after the Act of 1896 took effect. The cause of action therefore arose under that statute, the demand for the mileage book was made under that statute, and the action was brought under that statute. Under such circumstances, if the statute of 1895 is merged in the statute of 1896, the statute of 1896 is the only statute that could be enforced. The statute shows clearly that the Legislature intended the Act of 1896 to absorb the Act of 1895, so that the Act of 1896 would be the only statute of the State on the subject. The Act of 1896 is a "substitute" for the Act of 1895. Under such circumstances, the principles applied in litigations involving the construction of statutes should be applied here.

In *Matter of N. Y. Institution*, 121 *N. Y.*, 234, Earl, J., says (pp. 239, 241):

"*There are decisions holding that where prior laws are revised and "consolidated into a new act, such act is to be deemed to contain the entire "law upon the subject, and that a prior provision of law which is dropped*

"*is to be regarded as repealed.* In *Ellis vs. Paige* (1 *Pick.*, 43), it is "said: 'It is a well-settled rule that when any statute is revised, "or one act formed from another, some parts being omitted, the "parts omitted are not to be revived by construction, but to be con- "sidered as annulled. To hold otherwise would be to impute to "the Legislature gross carelessness or ignorance, which is altogether "inadmissible.' In *Bartlett vs. King* (12 *Mass.*, 537), it was held "that a subsequent statute revising the whole subject matter of a "former one, and evidently intended as a substitute for it, although "it contains no express words to that effect, must, upon principles "of law, as well as in reason and common sense, operate to repeal "the former.' * * * * * * * *

"In *Butler vs. Russell* (3 *Cliff.*, 251), Mr. Justice Clifford said: "'When a revising statute covers the whole subject matter of ante- "cedent statutes, the revising statute virtually repeals the former "enactments without any express provision to that effect, and even "when some parts of the revised statute are omitted in the new "law they are not in general to be regarded as left in operation, "but are to be considered as annulled, if it appear plainly that the "intention of the Legislature was to cover the whole subject "matter by the revising statute.' In *Patterson vs. Tatum* (3 *Sawyer*, "164), Mr. Justice Field said: 'The proposition of counsel that a "statute is impliedly repealed by a subsequent act revising the "whole matter of the first is undoubtedly correct.' *In re South-* "*worth* (5 *Hun*, 55), it was held that where a statute is revised, and "parts of the former statute omitted from the statute revising it, the "part so omitted cannot be revived by construction.

"Against the construction contended for by the petitioner, the "the general rule may also be invoked, that where two statutes re- "late to the same subject matter, though not in terms repugnant "and inconsistant, if the latter one is plainly intended to prescribe "the only rule that shall govern, it will repeal the earlier one "(*Davicss vs. Fairbairn*, 3 *How.* (*U. S.*) 636; *Morris vs. Crocker*, 13 *Id.*, "429; *King vs. Cornell*, 106 *U. S.*, 395; *Heckmann vs. Pinkney*, 81 *N.* "*Y.*, 211; *People vs. Gold & Stock Tel. Co.*, 98 *Id.*, 67; *People vs.* "*Jachne*, 103 *Id.*, 182, 193.)

"Some of the authorities cited go so far as to hold that where "prior statutes are revised or consolidated into one act, any part of "the prior statutes omitted must be deemed to have been repealed,

"although the matter omitted is in no way provided for in the new "law. But we need not go so far in this case. Here Section 8 of "the Act of 1865 contained provisions for the assessment and pay- "ment of the expenses of improving streets, and complete pro- "visions upon the same subject, somewhat dissimilar however, are "contained in the Consolidation Act, and hence they must be "deemed, under all the decisions, *to take the place of the prior pro- "visions, and to furnish the only rule upon the subject.*"

In *People vs. Wilmerding*, 136 *N. Y.*, 363, the State undertook to collect duties upon the sales of imported articles by an auctioneer, and the defendant, the auctioneer, claimed that the act which imposed the duties had been "repealed"; also that it was "unconstitutional."

In that case, as in this, the act involved commenced as follows:

"Section 1. Section 1 of Chapter 62 of the Laws of 1846, is "hereby amended so as to read as follows:

The act being so amended, the statutory question was whether duties could be recovered under the old act, or whether no duties could be recovered except under the later act. Upon this point Peckham, J., said (pp. 368, 372 and 374):

"It is a general rule that where a statute repealing an earlier "statute is itself repealed, the earlier statute comes in force upon "such last repeal. (*Van Denburgh vs. Greenbush*, 66 *N. Y.*, 1.) "There is also another rule well established in this Court, which "declares that a statute declaring a former statute to be thereby "amended so as to read as prescribed in the amending act, is not a "repeal of the original statute, and that from the time of the "passage of the amendatory act, such act is the only enactment on the "subject as to future transactions, and the former statute is merged "and lost in, and has no vitality distinct from, the amendatory act. "And it has been held that a repeal of the amendatory act does not "revive the original act, but both fall by virtue of the repeal of the "latter act. (*People vs. Supervisors*, 67 *N. Y.*, 109.)

* * * * * * * * * * *

"The whole argument does not, as it seems to me, give due and "proper weight to the principle which has been so plainly and so "recently decided by this Court in the case of *People vs. Supervisors*, "above cited.

"It was there distinctly decided that an earlier statute which "was amended and re-enacted in the shape of an amendment, so

"as to read as prescribed in the later amendatory statute, was "thereby wholly annul'ed *as to all future cases and became merged* "*and incorporated into the later statute.*"

* * * * * * * *

"It thus appears that the enactment of the later statute of 1866, "by reason of the language used in the first section thereof, did "thereby incorporate into it all the life and force of the first section "of the Act of 1846, *so that the later act stood from that time and as to* "*all future cases as the sole and only exponent of legislative intent and* "*power upon the subject and such act thereby utterly blotted out and anni-* "*hilated the earlier statute, except as to rights or duties already existing.*"

* * * * * * * *

"There is nothing in the case of *Matter of Rochester Water Com-* "*missioners*, 66 *N. Y.*, 415, which is at all inconsistent with the "views herein expressed. * * * * * In the Rochester case "the later statute which amended Section 23 of the earlier statute "'so as to read as follows,' did in truth enact an entirely new "section, leaving wholly out of it the original twenty-third section "of the earlier act. From a perusal of the two acts and the powers "granted therein the Court felt sure that the legislature by amending "the twenty-third section of the earlier act in the manner stated in "the later one, did not intend to repeal the earlier twenty-third "section, and in truth did intend to incorporate its text into the "amended section so that it should all read as one section, and thus "the original section was to be continued in force."

* * * * * * * *

"Having thus, by the amendment of 1866, accomplished the *total* "*annihilation of the first section of the Act of* 1846, *as to all matters* "*subsequently arising*, the case is then brought within the principle "of that of *People vs. Supervisors* (*supra*), and hence a mere repeal "of the Act of 1866, without some language equivalent to an "enactment, could not revive the absolutely dead provision of the "first section of the Act of 1846."

* * * * * * * *

"The case at bar also plainly differs from that of *In re Estate of* "*Prime* (*ante, p.* 347), decided at this term. In that case the later "act re-enacted the provisions of the former act, although not in "identical language. It was argued by the appellants that the later

"act repealed by implication the former one, and that rights which "had already accrued under the former one could neither be "enforced under it because of its implied repeal, nor under the "later act, because its provisions were prospective only. This "highly technical and refined reasoning was not sustained by the "Court."

This case involves a penal statute. Said Bartlett J., in *Quinlan vs. Welch*, 141 *N. Y.*, 164:

"The repeal of a penal statute discharges offenses committed "before such repeal and proceedings based thereon. (1 *Hale's Pleas* "*of the Crown*, 291; *Lartung vs. People*, 22 *N. Y.*, 99, 100; *Curtis* "*vs. Leavitt*, 15 *N. Y.*, 229; *Butler vs. Palmer*, 1 *Hill*, 324.) This "statute of 1873, *being in no sense penal*, it falls within the rule that "has long existed, and was recognized by this Court in *Matter of* "*Miller*, 110 *N. Y.*, 216."

The last point made by defendant in error takes up this point. He cites the Prime case, 138 N. Y., 347, and the Warde case, 154 N. Y., 342, to show that the Act of 1895 is still in force. We have shown the New York Courts do not so understand the Prime case. The Warde case, too, admits the force of the principle for which we contend. It is there said: "There was once, and long ago, a rule "in the construction of statutes, that an amendment of it was to be "regarded as if having been incorporated in and made a part of "the original enactment, *but that rule has for a long time been disre-* "*garded* and it is now settled that an amendment has no more "retroactive effect than an original act on the same subject." Opinion Haight, J., quoting with approval from *Ely vs. Halton*, 15 *N. Y.*, 595. See 154 *N. Y.*, 344.

Other N. Y. cases in addition to those I have heretofore cited might be cited to show the Statute of 1895 is "blotted out."

Pratt vs. Munson, 84 *N. Y.*, 582, *opinion* 585.
People vs. Upson, 79 *Hun*, 87-89; *aff'd* 147 *N. Y.*, 716.
McDermott vs. Nassau El. R. R. Co., 85 *Hun*, 422; *aff'd*, 147 *N. Y.*, 700.

Had this action been brought under the Act of 1895 for acts done before the Act of 1896 took effect, the Statutory Construction Act might save it but such is not the case. That act is to the same effect as the cases cited. Otherwise it does not touch this point. It provides "the repeal of a statute which amends a provision of a prior

"statute, leaves such provision in force *unless the amendatory statute "be a substantial re-enactment of the statute amended.*" Chap. 677, Laws 1892, Sec. 31.

The same rule has long been followed in the United States Supreme Court. In *U. S. vs. Tynen*, 11 *Wall.*, opinion 92, Field, J., said:

"Where there are two acts on the same subject the rule is to "give effect to both if possible. But if the two are repugnant in "any way of their provisions, the latter act, without any repealing "clause, operates to the extent of the repugnancy as a repeal of the "first; and even when two acts are not in express terms repugnant, "yet if the latter act *covers the whole subject of the first, and embraces "new provisions, plainly showing it was intended as a substitute for the "first act, it will operate as a repeal of that act.*" (Citing numerous cases.) See also *U. S. vs. Claflin*, 97 *U. S.*, 546.

Upon these authorities comment is unnecessary. They lay down the plain rule that when an entire act is so amended as to read "as follows," the later act is the only existing law on the subject, and the prior act is "annihilated," and cannot be made the basis upon which to recover penalties in this action.

This action, then, must rest upon the statute of 1896, which annihilated the Act of 1895. The statute of 1896 is unconstitutional, for the Court has so held it in the Beardsley case. Plaintiff in error may raise the point that it is unconstitutional, because the Court so holds in this case. As the Act of 1896 is unconstitutional and is the only support for this action, and the Erie Railrod Company can raise this objection against it, it follows that that objection must prevail and the judgment in this action cannot stand.

If these actions had been brought under the Act of 1895 for offences arising before the Act of 1896 took effect, the Statutory Construction Act might save them. But Purdy did not demand a book until June, 1896. The Act of 1896 had then become the only existing statute on the subject. Purdy made his demand under Act of 1896. He brought his actions under that act.

Therefore the above cases apply, and the Statutory Construction Act does not touch this question.

(c) *The Erie Railroad Company has not waived or surrendered its right to insist that this act is unconstitutional as a defense to Purdy's penal action based on a statute that is utterly "void."*

The Court says: "We know of no reason why a railroad company may not *agree* upon a sufficient *consideration* to *surrender* or *transfer* any specific pecuniary right." Grant this and where is the evidence that the Erie Railroad Company has agreed, contracted to surrender or transfer its constitutional right to one-third its own income for a "consideration"? The record shows nothing of the kind. Can such an important fact be assumed because we filed a certificate of incorporation November 14, 1895? The filing of such a certificate is not a waiver or "surrender" of our constitutional right to one-third our income from our own property. The "surrender" of so important a right should not be implied in the absence of evidence. The constitution gave us the right to all our income; *and general statutes of the State then fixed the maximum amount thereof.* When we were incorporated we accepted them. We never *accepted* the Mileage Act.

It was not a condition of the incorporation of defendant that it should accept the Mileage Book Act of 1895. There is nothing in the Mileage Book Act of 1895 justifying such a conclusion. We have shown these actions are all based upon the Act of 1896, which has "blotted out" the Act of 1895. The Act of 1896 is alone a live, complete and enforceable statute. These actions rest upon it. There is nothing in any statute of the State of New York, or any decision of the State of New York down to this case sustaining the judgment herein.

Purdy's counsel in the New York Court of Appeals contended:

"The Mileage Book Act of 1895 was in force at the time this "defendant had the breath of life breathed into it by its certificate "of incorporation November 14, 1895. * * * Having accepted "a charter granted it by the State, and the statute then being in "force requiring the issuance of mileage books, such statute "became as much a part of its charter as if it had been expressly "recited in its certificate of incorporation that it should issue mile-"age books, and having accepted the benefits of the franchise, it is "*estopped* from denying the right to impose conditions upon it." (Pp. 21 and 22.)

This case then rests upon the proposition that the Erie Railroad Company is "estopped" from urging the unconstitutionality of a penal statute as a *defense* thereto. Are the courts also "estopped" and under compulsion to enforce an unconstitutional law? Do

any cases so hold? Purdy's industrious counsel cites a number of cases to sustain his contention. Do those cases sustain it? According to his own statement of *Bushwick vs. Ebbets*, 3 *Edward's Ch.*, 353, in his brief in the Court of Appeals, that case is one where:

"The complainants were incorporated under a special act of the "Legislature. * * * The Court said: 'The complainants vol- "untarily accepted the charter *with that provision in it*, and are "bound by all it contains.'"

In other words, if the Legislature had passed a special act incorporating the Erie Railroad Company, and the Mileage Book Act had been a provision thereof, the Erie Railroad Company could not have accepted its charter without accepting such mileage book provision. But in this case there is no pretense, in the case or elsewhere, that the Mileage Book Act is made any part of any statute under which the Erie Railroad Company was incorporated. The Mileage Book Act has nothing to do with incorporating corporations. Consequently, the Railroad Company could incorporate under any act of the State permitting its incorporation, without either accepting or rejecting the Mileage Book Act. It was not called on to accept or reject the Mileage Book Act. No lawyer would claim that the lawyer who incorporated the Erie Railroad Company thereby advised it to take a position which "estopped" it from questioning the Mileage Book Act. On the contrary, when the Erie Railroad Company was incorporated, it had breathed into it the Constitution of the United States and the Constitution of the State of New York. The Constitution of the United States and the Constitution of the State of New York became a part of its charter. The general law giving it the right to full fare from all passengers became part of its charter. If the Mileage Book Act conflicted with this general law about fares and the Constitution of the State of New York, or the Constitution of the United States, it had to give way to them. The constitutions of state and nation are older than the Mileage Book Act. No legislature of the State of New York had the right or power to violate the constitution by passing that act. By filing a certificate of incorporation, the Erie Railroad Company did not yield the right to take this position. It did not in any way bind itself to yield one-third of its income to a certain favored class, in violation of both state and national constitution. The case does not disclose one word or one act of the Erie Railroad Company evidencing its intent to waive or surrender its rights under the

constitution. There is nothing in the case, or in the fact that it was incorporated, which warrants any holding that it intended to and did waive its right to assert that the constitution is the supreme law of the land and a statute enacted in violation of it is a mere nullity. And furthermore, the only law in force now is the Act of 1896, passed subsequent to the incorporation of the Erie Railroad Company.

Every one of the cases cited for defendant in error are where the law was valid or where the corporation did some act under the law clearly showing an acceptance of its provisions which afterwards estopped the corporation from questioning the validity of the statute thus accepted.

In *Philadelphia vs. Pennsylvania*, 52 *Pa. St.*, 451, the corporation was a municipal corporation. As such, it was a creature of express legislative enactment. If the city saw fit to accept a charter containing an unconstitutional provision, the city could not very well assert the unconstitutionality of such provision as against the State. The Court therefore said:

"With what grace, then, can they object to the constitutional "power of the Commonwealth to prescribe the conditions to which "they have *voluntarily assented*, and by virtue of which they enjoy "franchises * * * * It is enough for the occasion to say that "a municipal corporation which has so recently accepted a charter "*subject to this well known statute*, is not in position to raise a doubt "about its constitutionality."

In *Owens vs. St. L. & S. Ry. Co.*, 83 *Mo.*, 454, the defendant claimed that it was independent of the Constitution of the State and of the Statutes of the State under which it was created and came into being, and subject to which it took its charter. Of this claim that the corporation, created under the Constitution and Statutes of the State, was "independent of both," the Court said:

"It strikes me that the refutation of the proposition is found in "the statement."

In *Mayor vs. Broadway*, 17 *Hun*, 242, the condition on which the defendant was permitted to run its cars in the city was that it should pay certain license fees. Of course under such circumstances the Court said:

"The defendant *accepted its charter* with this burden, and of "course cannot be heard to object that it was or is illegal."

In *Nolensville vs. Quinby*, 28 *Tenn.*, 476, the proceeding was to assess damages "as prescribed by the Act of Incorporation." The plaintiff claimed the proceeding was unconstitutional. The Court of course said:

"Certainly the company have no right to complain, for the "charter, *with the provision in it*, was tendered to them and they "subscribed the stock, and organized the company, with a full "knowledge of the privileges and liabilities created."

In *C. C. & A. Ry. Co. vs. Gibbs*, 24 *S. C.*, 60, the whole matter appears in a single sentence:

"It may be that the general law of 1879 cannot be considered "as an amendment of the charter of the plaintiff, for the very con- "clusive reason that it was in existence at the time the charter was "granted; but, it seems to us, it was more than an amendment— "*it was a part of the charter itself*, or at least one of the conditions upon "which the charter was granted and accepted."

In *Alabama & V. R. R. Co. vs. Odeneal*, 73 *Miss.*, 34, the whole matter is again stated by a sentence:

"The Act of March 13, 1884, relative to farm crossings was then "in force and was therefore *integrated into this charter upon organiza-* "*tion*, and under said laws, as a part thereof; and appellant has "therefore no standing to question the constitutionality of the "legislative provisions touching such crossings."

In *McCandless vs. R. & D. Ry. Co.*, 38 *S. C.*, 103, the whole matter again appears in a sentence:

"So, when the State of South Carolina *made a contract by the grant* "*to this railroad company*, all of her laws in existence at that time "pertaining thereto became a part of such contract."

Again, in *People vs. Quigg*, 59 *N. Y.*, 89, the whole matter appears in a sentence:

"The law permitting judgment to be perfected upon the recog- "nizances upon default in the condition, was in force at the time "*recognizances were entered into and made a part of the terms and condi-* "*tions of the undertaking and covenant of the parties*, as much as if in- "serted in the instrument."

The Court undoubtedly saw that all of these cases were cases in which the charter was granted, or the license, grant or undertaking was made under such conditions that some condition, some burden,

was made a part of the very charter, contract, license, grant, or covenant, in such sense that the defendant was conclusively shown to have accepted the charter, contract, license or covenant, subject to its burdens. Having so accepted a charter, a license, or having so entered into a contract, covenant or undertaking, the defendant of course could not retain the benefits thereof and still undertake to repudiate the very burden "integrated" into the charter, license, contract or covenant.

But the Court below cited three cases in its opinion, which we will also examine.

In *Railroad Company vs. Maryland*, 21 *Wall.*, 456, there was a special charter granted by act of the Legislature, a provision of which was that the railroad company should pay the State "one-fifth of the whole amount which may be received for the transportation of passengers."

The question was whether the railroad company that accepted this charter, built its road under it, and paid the money under it for many years, could afterwards claim that this charter was unconstitutional. The Court did not hold that the railroad company was estopped from questioning the constitutionality of the law. On the contrary, in the highest court in Maryland, and in this Court, the railroad company was permitted to raise and discuss the question of the constitutionality of this act. The language quoted from that opinion in the opinion in this case is language used by Bradley, J., to show that the State was entitled to succeed on the merits of the controversy. In substance, the position of the Court was that the amount required could be exacted by the State as a consideration for creating the railroad company and giving it the powers granted to it. This appears from a sentence:

"It has a right to exact compensation for their use."

This was put upon the ground that the whole charter was a mere *contract*, because when the State had proposed it and the corporation had accepted it, it could be nothing else than a contract. This Court said (p. 468):

"The company was simply under a *contract* to pay the State one-
"fifth of the whole amount received for the transportation of pas-
"sengers. If there was anything unconstitutional in the arrange-
"ment it was in this *contract*."

Here, however, we are asked to go a long step in advance, and to hold that the Erie Railroad Company has waived the right to one-third of its own income from its own passengers, although it has never made any contract or accepted any charter by which it entered into such an agreement. We are to hold this too, where the *general statutes of the State* give the Erie Railroad Company the right to full fares from all and both constitutions uphold that right.

In *Ashley vs. Ryan*, 153 *U. S.*, 436, the State of Ohio required railroad corporations filing articles of incorporation in that State, as a condition thereof, should pay a fee or tax therefor equal to one-tenth of the par value of the entire stock of the consolidated corporation. Fifty-two thousand dollars was there paid "under protest," and a suit was brought to recover back all of it except $700, on the ground that the Constitution of Ohio and of the United States was violated by thus placing a burden on interstate commerce. This Court did not hold that the corporation was estopped from raising or debating the question, but it held that the State had the power to require the payment of this amount of money as a fee or tax, in consideration for which it would grant the corporation such privileges and franchises as it would acquire by filing its certificate and becoming a corporation of the State of Ohio.

In *Louisville & Nashville Ry. Co. vs. Kentucky*, 161 *U. S.*, 677, the question was whether the State of Kentucky could enjoin various railroad companies from acquiring various other railroad companies or from selling out to or operating their competitors, contrary to the statute of the State forbidding them so to do.

This Court did not hold that the corporations were estopped from raising the constitutional question in that case. On the contrary, it discussed that question and passed upon it on the merits. It said:

"While the constitutional power of the State in this particular "has never been formally passed upon by this Court, the power of "State legislatures to impose this restriction upon the general "authority to consolidate, has been recognized in a number of "cases." (P. 703.)

Could this or any other Court safely lay down such a doctrine as a reason for enforcing an unconstitutional penal statute where its unconstitutionality is set up and claimed as a defense?

The cases may all be summed up in three general classes:

1. Those in which the provision attempted to be questioned is a part of the charter, contract, covenant, or other instrument, by which the corporation receives its life, upon condition that it shall observe and perform the very provision which it afterwards undertakes to question.

2. Those in which the legislature requires the payment of a part of its income, or a percentage on its capital stock, as a fee or tax, in consideration for which it shall receive its corporate life.

3. Those in which the legislature exercises the power of self preservation, the police power of the State, in the interests of its citizens, by providing that competing railroad companies shall not consolidate.

I submit that this case does not come within any of these cases. Nor does this case come fairly within anything said in any of these cases. If this case is to be determined against the Erie Railroad Company it must be determined against the Erie Railroad Company upon some principle not yet determined by this Court, so far as I can find after a diligent examination of the reported decisions and the text-books of writers of authority.

Undoubtedly the Erie Railroad Company could waive its right to part or all of its income from passengers. No act is referred to as indicating such waiver, except the act of the Erie Railroad Company in filing a certificate of incorporation under the laws of this State November 14, 1895. It is not claimed that there is any express enactment or provision of law which required the Erie Railroad Company to waive its objections to the constitutionality of the legislation in question. The claim necessarily is a claim that it has waived its objection thereto by implication. I submit that no authority is cited, or can be cited, that will uphold such an extraordinary doctrine. Surely, the Courts are not to fritter away our Constitutions by implying a waiver of all unconstitutional laws in existence at the time of the birth of a corporation or an individual. A corporation or an individual does come into being under the Constitution and laws of a State or Nation, subject thereto. Such corporation or individual is bound to obey such Constitution and laws. But no Court has yet held that either a citizen or a corporation must yield constitutional guaranties and obey unconstitutional statutes that happen to be on paper at the time

of the birth of the citizen or the corporation. Here general laws also entitled us to our full income. They were valid. They could not be repealed by an unconstitutional law. They were not in form repealed by it. We had a right to stand on the valid general laws.

This case all comes back to this. Purdy's attorney says that the Erie Railroad Company had breathed into its charter an unconstitutional statute, a special statute, which thereby became a part of that charter, thus estopping the Erie Railroad Company from ever claiming the contrary. I claim that the Constitutions and general laws were breathed into the charter of the Erie Railroad Company at the time of its birth, and that that Constitution not only authorized but required the Erie Railroad Company to yield obedience to it as the supreme law of the land, even though thereby a penal statute that was already a nullity should be afterwards so declared by the decree of the Courts sworn to support the Constitution. If the constitutions and general statutes conflict with the special statute, the special statute must give way. This position is a perfect defense to an attempt to collect illegal penalties under an unconstitutional statute. We made this claim in our answer at once, never waived it, ever asserted it, and yet we were denied our constitutional rights.

(d) *The constitutionality of the act under the Interstate Commerce clause was clearly raised, and, as the judgment rendered requires the Erie Railroad Company to issue* 1,000 *mile books that can be exchanged for exchange tickets at any time, giving the holder thereof the rights and privileges that a first-class passenger has and good over the "line or lines" of its railroad, it follows the judgment necessarily affects Interstate commerce.*

The demands made and the Act of 1896 are an argument in support of this point. Had Purdy got the books demanded he would have had a contract good for ever, entitling him to first-class exchange tickets, good over the "line or lines" of railroad anywhere. The judgment holds he could compel us to give him such a book (contract), entitling him to such first-class tickets at any time for 1,000 miles over our "line or lines." Is this constitutional?

SUMMARY.

In this hastily dictated brief more attention has been given to precedent on points more nearly germane to the motion made to dismiss or affirm than has been given to the real merits of the case. The far-reaching import of questions of the character of those involved in this action is being weighed by those who understand the incumbrance which special privileges and unequal laws have ever proved to be in all nations. France before the Revolution presented a striking illustration of the pernicious character of such unequal laws and privileges, and after the Revolution, in spite of its many excesses, the more just distribution of property brought about by laws based upon the principle of equality has worked a corresponding contentment and happiness to the nation as a whole.

Our Constitutions, both State and National, undertake to guarantee every citizen from despotic inequalities in the laws. Our Constitutions try to guarantee to every citizen the equal protection of the laws as to life, liberty and property. When citizens band together and form corporations that become artificial citizens according to law, they, too, become entitled, as representing aggregations of property, to all constitutional provisions intended to protect property. No property long remains valuable, is "property," if it fails to produce income. The Erie Railroad Company is not a company paying large dividends on its stocks; in fact, its stocks are nearly worthless and have been for many years, because it is unable to pay any dividends whatever upon them.

In New York State, where this litigation arose, the difficult character of the country through which the Erie railroad runs and its comparatively sparse settlement, have caused the Legislature to permit it to charge three cents a mile, where the New York Central can only charge two cents a mile for passengers. Afterwards, at the behest of a particular class of wealthy merchants, or traveling men, or commercial interests, the Legislature passed a law to compel nearly all railroads, except the New York Central, in effect to give them one-third of their income if they would buy tickets wholesale; in other words, thousand mile tickets. The general law fixing a three cent fare was not repealed, the Constitution was not amended, but the Legislature boldly adopted class legislation in the interests of the well-to-do instead of the poor. We argued that legislation was not intended to apply to an inter-state railroad like the Erie, that

winds in and out over the State border; that it only applied to railroads of New York alone, but the Courts of New York held otherwise, and we understand their construction of the act on this point is not reviewable here.

In *Lake Shore vs. Smith*, 173 *U. S.*, 684, this Court condemned such class legislation. When that decision was brought to the attention of the Court of Appeals of New York, it said "yes," but it doubted its correctness and it thought it could find a way to estop the Erie Railroad Company from saying anything about the law of New York being unconstitutional. There was no pretense that the *litigant* had ever furnished any consideration on which to rest an estoppel, or that there was any reason as between him and the Erie Railroad Company why *he* should be able to estop the Erie Railroad Company from asserting its constitutional right and its legal right to its own income. There was no suggestion that the State had ever given a consideration to the Erie Railroad Company for intentionally waiving its constitutional right. Without evidence of waiver, except the fact that the Erie Railroad Company was born after the first act was passed, the Court held the Erie Railroad Company estopped from questioning the unconstitutionality of that act.

But it now appears that the Erie Railroad Company was born before the only act that is living or enforceable was passed. It appears that that subsequent Act of 1896 is much more onerous to the Erie Railroad Company than was the one of 1895. It appears that these actions were brought and the demands on which they rest were made under the Act of 1896.

It appears that the Act of 1896 has absorbed the Act of 1895 so completely that it has been "blotted out" and "annihilated" by the Act of 1896.

Nevertheless, overlooking these considerations, and the cases that justify them, the Court of Appeals proceeds to pronounce judgment against the Erie Railroad Company, by which judgment it compels the Erie Railroad Company to obey an unconstitutional and invalid law. It compels the Erie Railroad Company to enter into contracts with a favored class that are good forever, that are not even limited to its lines in the State of New York, but are sufficient evidence upon which to compel it to issue exchange tickets good upon its lines anywhere.

Furthermore, the Act goes beyond the Act of 1895, and for the

first time gives the holders of these tickets all the rights and privileges of first-class passengers who pay full fare.

The necessary effect of this judgment then is that it gives the Act of the Legislature of the State of New York an extra-territorial effect over all the lines of the Erie Railroad Company, and it enforces that admittedly unconstitutional Act, although it is subsequent in date to the incorporation of the Erie Railroad Company.

If such a decision is sustained, we have the anomaly of the United States Supreme Court declaring such statutes unconstitutional, and State Courts enforcing them. We shall soon have special privileges by which old corporations and new corporations may escape the operation of the same law designed for such corporations. The Constitution will be valid as the supreme law of the land as to some interstate commerce, and will be invalid as to other interstate commerce upon the same lines of railroad. Whether the Constitution will be effective or not will depend upon how much money the man had, and how large a ticket he bought, and not upon any other consideration except the age of the corporation.

From such a jumble, which would soon exceed anything France, or any other country, ever knew, it must be that there is some plain method of escape. That plain method of escape must be the enforcement of the Constitution of the United States in all States. All railroad corporations must be treated as equals in this respect. All persons bringing actions like these must be told that they are not in a position to urge the principle of estoppel against corporations either young or old. The principle of estoppel as against the enforcement of constitutional provisions, *even those protecting property*, must be confined to cases like those wherein the State, in consideration for granting special privileges to corporations expressly stipulates in return that the corporation shall pay the franchise tax, or a share of its tolls, or some other consideration. If a corporation sees fit to come into existence upon such conditions, it cannot complain if it is compelled to live up to them. But there is not a syllable of evidence in this record that the Erie Railroad Company occupies any such position, even as to the State of New York; *and it does not, as a matter of fact or law.* There is no evidence of waiver of our Constitutional rights. If there was as to the Act of 1895 it would not avail against the Act of 1896 under which these actions are brought, and which is alone enforcable.

And when we come back to this action, as between the parties

to it, there is no reason in this case anyway why the supreme law of the land should not be the law of this case, or why any Court in the State of New York should exercise its ingenuity to find a way to enforce a statute which it admits the highest Court in this or any other country has already condemned as a violation of the Constitution of the United States, and, therefore, as a statute invalid anywhere in any State.

I respectfully submit that instead of the writ of error being dismissed, or of an affirmance, that it is very apparent there should be a reversal of the judgments of the Courts of the State of New York with proper instructions to them.

ADELBERT MOOT,

Counsel for Plaintiff in Error,

BUFFALO, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 171.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

against

ALBERT L. PURDY.

Error to Supreme Court of the State of New York.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The brief submitted for the defendant in error requires that counsel for the plaintiff in error file this reply, that his duty to his client and this Court may be properly discharged.

POINTS.

I.

The mileage legislation of the State of New York which is in question here was claimed to be unconstitutional and void by virtue of "various" provisions of the Constitution of the United States, as appears by every answer filed by the Erie Railroad Company, and as appears by its motions to dismiss, to direct a verdict, and its exceptions to the rulings made and to the direction of a verdict against it, its motion for a new trial in the Appellate

Division, its appeal to the Court of Appeals, and the very opinion of the Court of Appeals, which Court alone wrote an opinion in the case.

(Answers, pp. 49–61; motion to dismiss, p. 65; motion for nonsuit, pp. 102, 103; direction of a verdict and exceptions, p. 104; exceptions ordered heard in the Appellate Division in the first instance, p. 105; motion for a new trial on such exceptions in the Appellate Division, p. 107; order overruling exceptions, denying motion for a new trial, and directing judgment for plaintiff, and judgment for plaintiff, pp. 108, 109; appeal to the Court of Appeals, p. 110; opinion of Court of Appeals discussing each Federal question upon the merits, pp. 116–120; assignments of error, pp. 120–122.)

In the light of the facts above stated, and the record above referred to, we do not understand how counsel can start out with the statement "that the only Federal question raised * * * "was that the Act in question was an attempt * * * to regu- "late commerce."

It was claimed from the beginning, by answer, motion and exception, that "other" provisions of the United States Constitution, one or "various," also rendered the legislation in question unconstitutional. Purdy had due notice that Federal *questions* were intended to be and were raised. Purdy having pleaded the statute of the State of New York as the basis on which to recover a penalty, if the Erie Railroad Company pleaded the provision of the Constitution with reference to regulating commerce, as a defense, and also "various other provisions" of the Constitution as a defense, and expressly reserved the right to claim that no cause of action was set out, we cannot understand how any lawyer or judge can fairly say that the Erie Railroad Company did not thus claim, in due time, its constitutional rights under the Constitution of the United States. If Purdy desired to know what particular articles of the Constitution of the United States were relied on, he could move the courts to have the answer of the Erie Railroad Company made more definite and certain in this particular, and if his motion was granted the articles could be specified. In the absence of such action, he cannot now claim that he understood the Erie Railroad Company to confine itself to a single provision of the Constitution of the United States, when every answer is to the contrary.

So, too, the motions to dismiss, to nonsuit, to direct a verdict, and the exception to the verdict directed against the Erie Railroad Company, are each and every of them broad enough to cover everything claimed by the answers. The same is true of the motion for a new trial on the exceptions. There is nothing in the record from beginning to end to show that these broad motions and exceptions were not intended to cover every possible claim that could be made under the Constitution of the United States.

There is nothing whatever to show that the Erie Railroad Company confined itself to the single constitutional provision with reference to regulating commerce. On the contrary, if it had intended to waive every other question and to confine itself to that question, no reason can be given for the form of every answer interposed; no reason can be given for the other broad motions made, as well as the motion made on the specific ground that it violated the Constitution with reference to regulating commerce.

The statute regulating the practice of this court in reviewing the final decision of State courts, and the decisions made under it, furnish no warrant for the argument submitted in behalf of Purdy. On the contrary, we have already shown in our previous brief that they are adverse to his contention in this particular. In view of the tenacity with which he hangs to his claim, in spite of the refusal of this court to dismiss this case, additional cases and considerations of this point may aid this court.

I do not understand the statute to have been substantially changed in this particular since September 24, 1789, when Chapter 20, Section 25, became the law. Within the very words of that statute, we have here "A final judgment * * * in the highest "court of a State * * * where is drawn in question the val- "idity of a statute * * * on the ground of their being re- "pugnant to the Constitution * * * of the United States, and "the decision is in favor of their validity; or where any title, right, "privilege or immunity is claimed under the Constitution * * * "and the decision is against the title, right, privilege or immunity "specially set up or claimed." (U. S. R. S., Section 709.)

Within the very words quoted, the very pleading of Purdy necessarily brings in question the statute on which he relies, and every answer of the Erie Railroad Company claims immunity from this statute, under the various provisions of the Constitution of the United States.

When we look at the decisions, they are equally favorable to our position. We have cited many of them in our previous brief, but quotations from others will also sustain our position. That position is that where a litigant in some manner fairly claims the protection of the Constitution of the United States under its "various" provisions, and does not waive any of them, or limit any of the motions or exceptions put on the record, if the question involved is one that in its very nature goes to the heart and life of the statute, the courts should examine the question on its merits. In this great land where all sorts of systems of legal procedure prevail, and all kinds of pleadings, motions and exceptions are permitted, and all sorts of motions to review and appeals are known, this court should not limit a broad claim made in the very first pleading, in a case of this character, without some evidence that the party making it has waived it and has intended to waive it in the courts below. A reason for this position is found in the quotation made from the Federalist. The language used was probably used by Hamilton, but whether used by him or not it is so clear and gives such a broad reason for this position, that it early attracted the attention of Ch. J., John Marshall, and he quoted it in his opinion in *Cohens vs. Virginia*, 6 *Wheat.*, 264. I quote a few sentences:

"Here another question occurs: What relation would subsist "between the national and State courts in these instances of concur- "rent jurisdiction? I answer, that an appeal would certainly lie "from the latter to the Supreme Court of the United States. The "Constitution in direct terms gives an appellate jurisdiction to the "Supreme Court in all the enumerated cases of Federal cognizance "in which it is not to have an original one, without a single expres- "sion to confine its operation to the inferior Federal courts. The "*objects of appeal*, not the tribunals from which it is to be made, are "alone contemplated. * * * Agreeably to the remark already "made, the national and State systems are to be regarded as *one* "*whole*. The courts of the latter will, of course, be natural auxil- "aries to the execution of the laws of the Union, and an appeal "from them will as naturally lie to that tribunal which is destined "to unite and assimilate the principles of natural justice, and the "rules of national decision. The evident aim of the plan of the "national convention is, that all the causes of the specified classes "shall, *for weighty public reasons, receive their original or final determ-* "*ination in the courts of the Union.*"

In *Crowell vs. Randell*, and *Shoemaker vs. Randell*, 10 *Peters*, 368, Justice Story reviewed the cases down to the January term of 1836, to show when the Supreme Court will review. Chief Justice Marshall had just died, and the opinion of Justice Story is full of quotations from his revered chief. This one will do as a sample:

"That construction is, that it is not necessary to state, in terms, 'in the record, that the Constitution or a treaty or law of the United 'States has been brought in question, or the validity of a State law 'on the ground of its repugnance to the Constitution. It is sufficient 'if the record shows that the Constitution, or a treaty or law of the 'United States might have been construed, or that the constitution-'ality of a State law must have been questioned; and the decision 'has been in favor of the party claiming under such law" (p. 397).

In *Armstrong vs. The Treasurer, etc.*, 16 *Peters*, 281, the law on this 'subject is thus stated (p. 285):

"This must be shown: first, either by express averment, or by 'necessary intendment in the pleadings in the case;

"Or, secondly, by the direction given by the court, and stated in 'the exception;

"Or, thirdly, when the proceeding is according to the law of 'Louisiana, by the statement of facts, and of the decision, as usually made in such cases by the court;

"Or, fourthly, it must be entered on the record of the proceed-'ings in the Appellate Court, in cases where the record shows that 'such a point may have arisen and been decided, that it was in fact 'raised and decided; and this entry must appear to have been 'made by the order of the court, or by the presiding judge by order 'of the court, and certified by the clerk, as a part of the record in 'the State court;

"Or, fifthly, in proceedings in equity, it may be stated in the 'body of the final decree of the State court from which the appeal 'is taken to this court;

"Or, sixthly, it must appear from the record that the question 'was necessarily involved in the decision; and that the State court 'could not have given the judgment or decree, which they passed, 'without deciding it.

"We are not aware of any other modes in which the judgment 'or decree of a State court can lawfully be brought before us; and

"we have stated them particularly, in order to prevent, in future, "the difficulties and discrepancies which have so often arisen on "this subject."

In *Curran vs. Arkansas*, 15 *How.*, 304, legislation of the State of Arkansas with reference to a State bank was involved in litigation in the courts of the State of Arkansas. The judgment necessarily held that the legislation in question did not impair the obligations of the contracts of the bank. The acts in question were specified in the pleadings, but, so far as I can discover, there was no specific claim made anywhere that the acts in question were unconstitutional under the Constitution of the United States, although we might draw that inference from the fact that the acts were attacked The court said:

"Each of these laws is specifically referred to in the bill, and its "operation upon the property of the bank averred, and made a "subject of complaint. * * * It necessarily follows, therefore, "that the Supreme Court of the State held these laws valid, and "that by force of them the State was not subject to the principles "upon which it would otherwise have been chargeable.

"It is sufficient * * * that it appears by the record that "the question, whether a law of the State impaired the obligation of "a contract, was necessarily involved in the decision, and that such "law was held to be valid, and the decision made against the "plaintiff in error by reason of its supposed validity." (Pp. 320, 321).

In *Furman vs. Nichol*, 8 *Wall*, 44, the legislation of Tennessee applicable to banks was involved; also the decision of the Supreme Court of that State thereon. In the pleadings nothing was said about the Constitution of either state or nation, but it was said it was not in the power of the State of Tennessee "to impair or annul "the validity or binding force of said contract." Upon such pleadings it is said:

"It is enough for the purposes of this suit to say, that a cause "can be removed from a State court * * * whenever some one "of the questions embraced in it was relied on by the party who "brings the cause here, and when the right he claimed it gave him "was denied to him by the State court" (p. 56).

In *Murray vs. Charleston*, 96 *U. S.*, 432, it does not appear that the unconstitutionality of the ordinances there questioned was pleaded or brought in question on the trial, but on the appeal the claim was made that the tax levied pursuant thereto "impairs the "obligation of said contract and is, therefore, unconstitutional and "void."

The highest court of the State did not sustain this claim. This court reviewed that decision, saying:

"Everywhere in our decisions it has been held that we may re- "view the judgments of a State court when the determination or "judgment of that court could not have been given without decid- "ing upon a right or authority claimed to exist under the Constitu- "tion, laws or treaties of the United States, and deciding against "that right. *Very little importance has been attached to the enquiry "whether the Federal question was formally raised*" (p. 442).

In *Spencer vs. Merchant*, 125 *U. S.*, 345, we have a writ of error to the Supreme Court of the State of New York to review a decision of that court and of the Court of Appeals. The case involved taxes a tax lien, and was submitted to the General Term on an agreed state of facts, which also stated the questions involved, and says nothing whatever about any constitutional question (p. 350). There, as here, the words of the Constitution of the State, and the words of the Fourteenth Amendment of the United States Constitution, are the same in substance. The court said:

"*No specific mention of either constitutional provision was necessary* "in order to entitle him to a decision of the question by any court "having jurisdiction to determine it. The adverse judgment of "the Supreme Court, affirmed by the Court of Appeals of the State, "necessarily involved a decision against a right claimed under the "Fourteenth Amendment to the Constitution of the United States, "which this court has jurisdiction to review" (p. 352).

Nor do authorities cited against us lay down a different rule as we have shown (former brief pp. 12–22). *Oxley S. Co., vs. B. Co.*, 166 *U. S.*, 648, now cited adversely is not authority against because that case admits the rule is "it is not always necessary to refer to "the precise words, or the particular Section of the Constitu- "tion * * * it is sufficient if it appears affirmatively from "the record that a right, title, privilege or immunity is specially

"set up, or claimed under that instrument" (p. 657). (See also former brief and cases pp. 28–30).

Additional and later authorities on this subject are quoted in our previous brief, pages 18–22. The quotations there made show that this question "is itself a Federal question," and the court below decided against us not because the question was raised "too late," but "on its merits." (See former brief, pp. 12–22, and cases cited; also opinion Gray, J., in *Carter vs. Texas*, 177 *U. S.*, 442, 447; opinion Peckham, J., in *Sully vs. Bank*, 178 *U. S.*, 289, 298.)

This is certainly a case where, to use the very words of the statute, a "title, right, privilege, or immunity, is claimed under the Constitution"; and this was "specially set up or claimed" in every answer of the Erie Railroad Company, at the very beginning of this litigation. Purdy was advised by each answer that this claim was as broad as the "various" provisions of the United States Constitution. There is nothing in the record to show that the Erie Railroad Company ever waived or ever intended to waive these claims, or any of them, by virtue of anything said or done on the trial, or upon any appeal.

If "weighty public reasons" require that questions of this character be reviewed by this court; that the State courts be treated as "natural auxiliaries to the execution of the laws of the Union"; in the language of the Federalist, adopted by Chief Justice John Marshall, it follows that the very theory of our government requires that cases of this character be reviewed by this court, if the successful party has had fair notice that the defeated party "claimed" protection under the various provisions of the United States Constitution.

If this case were a case in which the successful party could have given any evidence to change the result, and it appeared that he was misled by the pleading and therefore failed to give it, there would be a sound reason for refusing to exercise jurisdiction, but, in a case like this, where the successful party pleads and relies upon a State statute as the basis of this action for penalties, and the defeated party claimed this statute was unconstitutional under the various provisions of the Constitution of the United States, the highest court of the State having sustained the validity of the State statute, this court should reverse that decision, if the State statute was in fact unconstitutional within any of the various provisions of the Constitution of the United States. This is particularly true

where the State court considered the question upon the merits. Being true, the brief of Purdy's counsel is a silent admission that the case of *Lake Shore vs. Smith*, 173 *U. S.*, 684, is fatal to the judgment of the New York courts now here for review.

No serious attempt seems to be made to answer our previous brief, pages 30–41; also pages 50–53, on this point.

II.

Purdy's claim that Lake Shore vs. Smith, 173 U. S., 684, is not applicable because his action for penalties is based on the statute of 1895, which preceded the incorporation of the Erie Railroad Company, and, therefore, such unconstitutional statute became binding on the Erie Railroad Company, is unsound, because his action in fact was brought under and is dependent upon the statute of 1896, which was enacted after the Erie Railroad Company was incorporated.

The considerations and authorities brought to the attention of this court in our previous brief, pages 30–49, remain untouched and unanswered. Without again going into the authorities previously cited in support of Purdy's position, already referred to in that brief, I may do the court a service by briefly stating our position and calling attention to the character of some additional cases cited now in support of Purdy's position.

Our position is:

1. Every complaint in every action of Purdy demands a penalty because the Erie Railroad Company has violated the statute of the State of New York, "Laws of 1895, *as amended by Section* 1 *of Chapter* 835 *of the Laws of* 1896;" the claim being that the acts of the Erie Railroad Company are "all against the form" of the said statute (pp. 5–48).

2. The statute of 1896 contains every word of the statute of 1895, and also contains whole sentences adding new and very onerous conditions to the Act of 1895; the Act of 1895 being comparatively innocuous, and this being the reason why the Legislature "annihilated" it in this manner by the Act of 1896. (See former

brief, pp. 34, 35, containing the statute; also pp. 31–34, specifying some of the particulars in which the legislation makes the Act more onerous to railroads).

3. In the opinion of the learned court below, it is expressly conceded: "The statute of 1896 was passed subsequently to the "incorporation of the defendant, and if the statute increased the "burden imposed on the defendant by the Act of 1895, as to such "additional burden it would be invalid" (Record, p. 119).

4. A comparison of the two Acts shows that instead of the last Act being more favorable to the Erie Railroad Company, it did impose many onerous burdens on the Erie Railroad Company not imposed by the Act of 1895; in fact, the Act of 1896 came into being because the Act of 1895 was impractical and really imposed few, if any, burdens on the Erie Railroad Company and like railroads. (See our former brief, pp. 30–42).

5. The Act of 1896 imposing additional burdens on the Erie Railroad Company having been passed *after* the Erie Railroad Company was incorporated, Purdy's action cannot be sustained, because it rests on the Act of 1896.

6. Purdy's action cannot be sustained under the Act of 1895, because that is not pleaded as the basis of his action for penalties, and his demands are framed under and expressly refer to the Act of 1896. (Pp. 71–77 of Record).

7. The court below could not say, and this court cannot say, that the Erie Railroad Company would have refused a mileage book under the Act of 1895 alone, and, in accordance with its terms and conditions, if that alone had been demanded, and because the court below could not so decide and this court cannot so decide, it was essential, and is still essential, that the Act of 1896 be determined to be constitutional in order to sustain Purdy's action here, because it is an action for penalties and is to be judged by the strict rules of law that are applied to actions for penalties.

8. "Every demand made by Purdy was for a mileage book to "travel one thousand miles on the line or lines of your road "* * * under Chapter 1027 of the Laws of 1895, as amended by "Chapter 835 of the Laws of 1896 of the State of New York." (Record, pp. 71–77).

It being conceded that the Erie Railroad Company is an interstate railroad that runs through New Jersey, Pennsylvania, New York, Pennsylvania again, Ohio, Indiana and Illinois, (as shown by the map exhibit between pages 110 and 111, as was pleaded by the answers of the Erie Railroad Company), it follows that if the Erie Railroad Company had complied with the demand of Purdy, in the very language of the statute under which that demand was made, Purdy would have had the right, at once, or at any time, to exchange his book for an "exchange ticket" good "for the number "of miles which he, or any member of his family or firm, or sales-"man of such firm, wishes to travel on the line or lines of such "railroad."

He could do this "at any ticket office on the line or lines of such railroad."

It was further provided in 1896 for the first time: "*Such mile-"age exchange ticket shall entitle the holder thereof to the same rights and "privileges in respect to transportation of person and property to which "the highest class ticket issued by such corporation would entitle him.*"

Every one of these additional burdens was imposed by the Act of 1896, and Purdy could have demanded no mileage book or exchange ticket of the character demanded by him, but for these additional burdens imposed by the legislation of 1896. If such burdens are burdens the Legislature of New York could not impose on the Erie Railroad Company, then Purdy's demand that it subject itself to contracts good forever, by virtue of this unconstitutional burden which the Legislature undertook to place on the Erie Railroad Company after it was incorporated, permitted the Erie Railroad Company to refuse the ticket demanded, without thereby subjecting itself to penalties in this or any other action. (See statute, former brief, p. 35.)

9. The language from the Act of 1896 which is quoted also shows that the additions made to the legislation by the Act of 1896 clearly make it an Act regulating interstate commerce on the Erie Railroad Company as to passengers, because a person obtaining a "mileage exchange ticket" for one thousand miles, in the manner provided for in the statute, would be entitled to the same rights, according to the statute, to which the purchaser of the "highest class ticket issued by such corporation" would be entitled. The purchaser of the highest class ticket could travel from Jersey City

substantially to Chicago, a distance of a trifle over one thousand miles, and as the "holder of any such mileage ticket" could exchange it at once, or at any time, for a "mileage exchange ticket," for a number of miles "equal in number to the number of miles which he, or "any member of his family or firm, or salesman of such firm, wishes "to travel on the line or lines of such railroad," it follows that what Purdy demanded under the statute was a book that would legally entitle him to such a ticket, upon which it would be optional with him to travel substantially from New York to Chicago, "on the line or lines of such railroad."

Even if the courts of New York could construe such legislation as having reference only to the lines within the State of New York, still Purdy having demanded and obtained such a book, and then being entitled to such a "mileage exchange ticket" therefor, giving him these rights, the Erie Railroad Company would thus become a party to a contract with Purdy which would entitle Purdy to all the rights specified in the statute. The only way the Erie Railroad Company could protect itself from such a statute, such a book, such a mileage exchange ticket, or such a contract, was to refuse the book that would entitle the holder to such rights on its line or lines. Therefore, the failure or refusal of the Erie Railroad Company to furnish Purdy with such a book when demanded does not make it liable for penalties at his suit, because he could only entitle himself to penalties against the Erie Railroad Company by making a demand for what the Erie Railroad Company was legally obligated to give him, whereas, if he demanded a book as broad as a statute in part at least unconstitutional, illegal and unlawful, that demand could be lawfully refused by the Erie Railroad Company.

Nor do the additional decisions cited for Purdy meet these suggestions. Most of them are disposed of by the authorities cited and what is said in our previous brief, pages 35–41. The only additional authorities cited readily resolve themselves into two classes. One class is like *Pinney vs. Nelson*, 22 *Sup. Ct.*, 52, 54; *Turner vs. Board of Commissioners*, 173 *U. S.*, 461; and *Lehigh W. Co. vs. Easton*, 121 *U. S.*, 388; but these cases have nothing to do with the question, because they only hold, in substance, that if a contract is made after the passage of a statute touching its subject-matter, the contracting parties cannot claim that the statute previously made has in effect impaired the obligation of the contract.

The other class of cases is like *Matter of Prime*, 136 *N. Y.*, 347, which is distinguished in *People vs. Wilmerding*, 136 *N. Y.*, 363, on the ground that in the Prime case the provisions of the former act were not re-enacted "in identical language"; hence the latter statute did not repeal the former, as the latter statute did repeal the former in the Wilmerding case. (See former brief, pp. 38–40).

Of course, if the Erie Railroad Company had violated the Act of 1895 before the Act of 1896 came into being, the statutory construction act of the State of New York would have saved any cause of action under the Act of 1895, but as the demands were not made until the Act of 1896 had taken effect, no such question is presented here, and *Matter of Davies*, 168 *N. Y.*, 89, 100, therefore, has no application to this case. In that case, the acts complained of preceded the statute; here, the acts complained of followed the latter statute, and, therefore, the latter statute alone is to be construed.

III.

The additional authorities cited on behalf of Purdy to show that Lake Shore vs. Smith, 173 U. S., 684, does not reach this case on the merits, do not establish that proposition; but, on the contrary, the very liberty of contract essential to a common carrier for hire, that it may carry passengers through the various States through which the lines of the Erie Railroad Company run, makes it necessary that this court preserve the constitutional guaranties of the National Constitution, that commerce may remain free and unrestrained.

The legislation in question strikes at the income of the Erie Railroad Company, and, therefore, the same words in the Fourteenth Amendment become operative that the court enforced in *Smyth vs. Ames*, 169 *U. S.*, 466. That case clearly shows that where such property rights of the Erie Railroad Company are concerned, although a corporation, it stands on the same footing of a natural citizen. If engaged in interstate commerce, it should, therefore, have the same liberty of contract guaranteed to a citizen. Although the Erie Railroad Company is an artificial citizen of the State of New York, and subject to the laws of that State, within that State,

the courts of that State cannot deny to it the exercise of its contractual rights outside of the State, when interstate commerce is concerned. *The income of the corporation is protected from confiscation in Smyth vs. Ames; the liberty of the citizen to contract is upheld, Allgeyer vs. La.*, 165 *U. S.*, 578; *and interstate passengers and commerce moving by rail are free from State regulations, even in the State, Ill. C. R. vs. Ill.*, 163 *U. S.*, 142–153.

Allgeyer vs. La., supra, is clearly distinguished from *Hooper vs. Cal.*, 155 *U. S.*, 648, and that line of cases, by the fact that insurance "is not interstate commerce," and, therefore, acts done wholly within a State in obtaining insurance, are subject to the laws of such State (opinion, pp. 587, 588).

Cases like *Dodge vs. Cornelius*, 168 *N. Y.*, 242, have no bearing to the contrary, because there the statute of New York requiring a witness to a will to pay a penalty of $50 if he does not write his residence opposite his name, involved no question under the United States Constitution, and according to the opinion of the court, and the statement of the case, neither the answer nor any appropriate motion or exception on the trial, nor any appropriate motion for a new trial at the Appellate Division, raised the question of the constitutionality of such legislation, whereas here all those conditions are different. Although the courts of New York had already upheld the legislation in question when this trial took place, nevertheless, we expressly pointed out in our brief in the Appellate Division, quoted in our former brief here (p. 16), that it was claimed that the legislation in question did "violate the Constitution of the United States * * * upon the facts now before this court."

In like manner, counsel claims that the constitutional question was raised in *Beardsley vs. Erie R. R. Co.*, 162 *N. Y.*, 230, and, therefore, the Court of Appeals followed the decision of this court in the Smith case, whereas a report of that case, or an examination of the original Beardsley record, which we have, will show that the only ways in which the question was raised in that case was by a demurrer on the ground the complaint "does not contain facts sufficient to constitute a cause of action" (Beardsley record, p. 8); an answer that the law of 1895 was unconstitutional, because "it attempts to interfere with commerce between the States, the regulation of which has, by the Federal Constitution, been committed solely to Congress, as well as for other reasons" (p. 20); a general exception to the judgment of the court and an appeal (Beardsley record, pp. 33–37).

Here, each answer is much more explicit, and is expressly based on the interstate commerce clause and on "various other provisions" of the United States Constitution. So, too, each answer here starts out with insisting upon the legal defense that the complaint does not state facts sufficient to constitute a "cause of action" (p. 49).

Here, also, we have all kinds of motions that test the sufficiency of the legislation upon which Purdy depends, and all kinds of exceptions to the rulings of the court by which the court even directed a verdict against the Erie Railroad Company, whereas in the Beardsley case we find no such motions and no such exceptions in the record, but only a general exception and a general appeal. (Beardsley record, pp. 33–37.)

Upon such a showing, it cannot fairly be said that there is no distinction between the Beardsley case and this case, except that the Beardsley case involved the old Erie Railroad Company before the foreclosure, and involved the Act of 1895, whereas this case involves the new railroad company, and the Act of 1896. We have shown that the Act of 1896 is much more onerous than the Act of 1895, and, therefore, that in this respect this case is more favorable to the Erie Railroad Company than was the Beardsley case. All that is left of the distinction, therefore, is that the present Erie Railroad Company was incorporated after the Act of 1895 took effect and before the Act of 1896 was passed. Upon this point, we have tried to demonstrate, and we believe we have demonstrated, that there is no basis for the claim that the prssent Erie Railroad Company by its charter, or in any other way, agreed to assume the unconstitutional burdens of either Act; also that the Act of 1896 is the only one with which it has to deal, and certainly it did not assume the burden of the unconstitutional features of that Act by filing a certificate in 1895, when the Act was not passed until 1896. Upon these points we are willing to leave the case with what is said in our former brief, pages 30–49.

In substance, the whole contention on this point is that the present Erie Railroad Company is estopped from claiming that the legislation in question is unconstitutional. Such a doctrine is novel, obnoxious, and should never be applied except in a very clear case. Indeed, the Court of Appeals of the State of New York have long since expressly held that such a doctrine could not be applied even to a statute, saying: "A statute cannot be evaded by estoppel."

Opinion R. R. Co. vs. Van Horn, 57 *N. Y.*, 473–476.

If a statute cannot be evaded by estoppel, can the Erie Railroad Company be estopped from claiming the protection of the Constitution as a defense to an attempt to enforce an unconstitutional statute? It does not answer this question to show that corporations are subject to the laws of the State in which they do business provided they enter the State to do business under such circumstances, or provided they are incorporated under such circumstances as to clearly show a waiver of any claim that the statute under which they enter, or under which they are incorporated, is unconstitutional.

The numerous insurance cases with which counsel now seeks to sustain Purdy's judgment, do not reach this point. The foundation of all those cases is that the insurance companies cannot invoke the protection of the Constitution, because when they enter a State to do business they necessarily subject themselves to its insurance laws. Furthermore, the root difficulty with such cases is that "Issuing a policy of insurance is not a transaction of commerce."

Paul vs. Va., 8 *Wall.*, 168.
Philadelphia F. I. Co. vs. N. Y., 119 *U. S.*, 110.
Hooper vs. California, 155 *U. S.*, 648, 653, 654.
Orient Ins. Co. vs. Daggs, 172 *U. S.*, 557.
N. Y. L. Ins. Co. vs. Cravens, 178 *U. S.*, 389, 401.
Hancock Mut. L. Ins. Co. vs. Warren, 181 *U. S.*, 73.

It is entirely true that a State may tax the tangible or intangible property in that State of a corporation operating a bridge between two States, without thereby interfering with interstate commerce. The ground of such a decision is:

"The interference with the commercial power *must be direct*, and "not the mere incidental effect of the requirement of the usual "proportional contribution to public maintenance."

Erie R. R. Co. vs. Pa., 158 *U. S.*, 431, 439; *approved Henderson Bridge Co. vs. Ky.*, 166 *U. S.*, 154.

There was a strong dissent from this position in the last case, and the distinction is a very nice one, but it is sufficient to clearly disclose that the last case referred to is not an authority in favor of Purdy and his action for penalties.

Nor do cases like *Hopkins vs. U. S.*, 171 *U. S.*, 578, involving, by laws of an unincorporated live stock exchange in Kansas City, help Purdy, because that case expressly recognizes the distinction between things "whose direct and immediate effect is restraint upon that "kind of trade or commerce which is interstate," and things "not "*directly* connected with, as forming a part of, interstate commerce, "although the cattle may come from another State." (Opinion pp. 591, 592.

The last case shows that there may be local charges within a State *indirectly* affecting interstate commerce, and yet the legislation or the contracts producing such charges will be beyond the reach of the Federal authorities, whereas if legislation or contracts *directly* affect interstate commerce in a matter wherein Congress can "regulate" such commerce, it will follow that the State right must yield to the Federal right. In such cases the common carrier for hire engaged in transporting persons and property through various States should be as free as the citizen to make all proper contracts and charges; subject always to the power of the Interstate Commerce Commission to condemn any that are "unjust," "unreasonable," or those that make "undue" discrimination.

Here contrary to the Interstate Commerce Statute of Congress the New York legislature and courts order us to make such "undue" discrimination in favor of those having $20.00 in cash and against those who are poor.

IV.

The legislation of the State of New York, as construed by the judgment rendered by the courts of that State, regulates commerce between the States, and deprives the Erie Railroad Company of one-third of its income from passengers, without due process of law.

What we have just said under the last point may be repeated here.

We do not understand how it can be claimed that that Federal question, which it is admitted was sufficiently raised, was not necessary to the decision of the case, "for the judgment may well be supported upon the ground not involving a Federal question." (Brief for Purdy, Point V, p. 7).

Certainly, it is unnecessary to cite cases to show that if this case was determined below upon some primary question, independent of any Federal question, then this court will not review the judgment rendered. The cases cited against us hold no more, and need no further comment (*Chicago, B. & Q. vs. Chicago*, 166 *U. S.*, 226, 232.) But this court can at once see that if the legislaton of the State of New York was necessarily legislation to regulate commerce, or was so construed by the judgment of the court as to give it that effect, then this court can and should review the judgment rendered. The question is not what the court below *said* about the statute in this or any other case. The opinions of the Supreme Court of the State of New York in other cases, or the opinion of the Court of Appeals in this case, are valuable as giving us the views of those courts upon the true construction of the statute in question. But the question all the time is whether those opinions truly state the construction actually given to the statute in question *by the judgment rendered by the courts below*. If the judgment rendered by the courts below violates the Constitution of the United States by giving a construction to the statute that makes it a regulation of interstate commerce, then the judgment rendered is erroneous and should be reversed.

The judgment rendered by a direction of the court certainly rests upon the Act of 1896. That Act, as set out on our former brief (p. 35), contains additions that clearly indicate the intention to make it applicable to interstate commerce.

When a man can go to any ticket office of a railroad company, buy a book for a thousand miles, immediately, or at any time, demand a mileage ticket good as a first-class ticket, over a thousand miles of the railroad line or lines wherever he, his firm, or his family wishes to travel, it is clear that he is put in position to force a contract from the railroad company, if written in the very language of this statute, that utterly ignores State lines. Such a contract would not be a contract good only in the State of New York, but would be a contract good anywhere upon the line or lines of the railroad. It would be optional with the holder of it where he would travel, and upon what line or lines he would use it, if the contract, book, or ticket, was written in the very language of the statute, in the very language of the demand made by Purdy.

Now, for failing or refusing to give such a contract to Purdy, under such a statute, the Erie Railroad Company is held liable for

the penalty provided by legislation. There is not one syllable anywhere that Purdy, or any one, limited himself, or proposed to limit himself, to the State of New York in any way, shape or manner, in the book demanded, or the ticket to be obtained thereby. On the contrary, the demand was as broad as the statute, and consequently a judgment that the Erie Railroad Company is liable for refusing to comply with the demand is a judgment that the statute can be made operative, like a decree of the court, to force from the corporation a contract good anywhere and everywhere on its lines, at the option of the holder.

The vital point is not that the statute begins "Every railroad corporation operating a railroad in this State," but the vital point is that the statute of 1896 added the important provisions added that year. These provisions of what is sometimes called the "Pingree" legislation, were put in the statute to give it some value to the people who have money enough to buy transportation wholesale, instead of retail, provided they can get a discount of 33⅓ per cent. *This legislation ought to be labeled "Legislation to compel railroads to sell transportation wholesale to rich people, at a discount of 33⅓ per cent., and compel railroads to accept such transportation anywhere on their line or lines, at the option of the holder."*

Now this legislation operates upon any railroad of the State of New York like an injunction of the court. Any railroad of the State of New York is compelled to make and sell books in the form required by the statute, and to make and sell mileage exchange tickets therefor in the form provided by the statute. In that form, such books and such tickets would be as good outside of the State of New York as inside the State of New York, at the option of the holder. The Erie Railroad Company has refused to comply with this legislative injunction, or decree, and, because it has done so, courts of the State of New York have said it should be punished by being made to pay a penalty. If such a judgment is sound, it gives a construction to the statutes that forces the Erie Railroad Company to make books in this form, to make and sell this form of mileage exchange tickets, and to honor such books and such tickets anywhere on its line or lines when presented. It holds in effect that New York may regulate the rights and prices of interstate passengers. This is the construction necessarily given to this legislation by the judgment rendered. So both the States and Congress can regulate interstate commerce carriers as interstate traffic. The disclaimer on

this point in the opinion does not affect the direct command of the judgment that we either make and sell just such books and tickets as the statute of 1896 requires or pay penalties for refusing so to do. What power has the New York Legislature here? Chief Justice John Marshall said:

"It has been contended by the counsel for the appellant (Daniel "Webster) that as the word to regulate implies in its nature, *full* "*power* over the things to be regulated, it excludes, necessarily, the "action of all others that would perform the same operation on the "same thing. * * * There is great force in this argument "and the court is not satisfied it has been refuted." (*Gibbons vs. Ogden*, 9 *Wheat*, 1.)

In *Hall vs. DeCuir*, 95 *U. S.*, 485, the statute of Louisiana commences:

"*All persons engaged within this State* in the business of common "carriers of passengers, shall have the right to refuse to admit "any person to their railroad cars, street cars, steamboats, * * * "when such person shall, on demand, refuse or neglect to pay the "customary fare, * * * provided said rules and regulations "make no discrimination on account of race or color."

Mrs. DeCuir, a colored person, "took passage upon the boat "* * * from New Orleans, for Hermitage, a landing place "within Louisiana, and, being refused accommodations on account "of her color, * * * brought this action. * * * Benson, by "way of defense, insisted * * * that the statute was inopera-"tive and void * * * because as to his business it was an attempt "to 'regulate commerce among the States,'" (pp. 485, 486).

Nevertheless, judgment was given against Benson for $1,000 penalties under the statute. Upon appeal it was said:

"But we think it may safely be said that State legislation which "seeks to impose a direct burden upon interstate commerce, *or to* "*interfere directly with its freedom*, does encroach upon the exclusive "power of Congress. The statute now under consideration, in our "opinion, occupies that position. It does not act upon the business "through the local instruments to be employed after coming within "the State, but directly upon the business as it comes into the "State from without, *or goes out from within*. While it purports

"only to control the carrier when engaged within the State, it "must necessarily influence his conduct to some extent in the man- "agement of his business throughout his entire voyage. * * * "Commerce cannot flourish in the midst of such embarrassments. " * * * Uniformity in the regulations by which he is to be "governed from one end to the other of his route is a necessity in his "business, and to secure it Congress, which is untrammelled by "State lines, has been invested with the exclusive legislative power "of determining what such regulations shall be" (pp. 488–490.)

Upon the point there involved, and here involved, as to whether the statute could be confined to the State itself, the court rendered a judgment for the penalty. There, as here, the facts, the judgment, did not limit the words of the statute.

So the court then said:

"Such was the construction given to that Act in the courts be- "low, and it is conclusive upon us as the construction of a State "law by the State courts."

This language does not refer to the opinion of the court, for the court below did not admit it had given the Act an extra-territorial effect by its construction, but this language refers to the effect of the judgment for $1,000 penalty which had been rendered against Benson on the theory that such State legislation was valid. We think it quite apparent that this case is clearly in point here as to the form of the statute, the effect of the State construction necessarily given by the judgment for a penalty under such a statute, and upon the question of whether such a statute is a regulation of interstate commerce.

Wabash R. Co. vs. Illinois, 118 *U. S.*, 557, is a leading case also in point here. There, a statute of Illinois enacted, as stated in the syllabus:

"If any railroad company shall, *within that State*, charge or re- "ceive for transporting *passengers* or freight of the same class, the "same or a greater sum for any distance than it does for a longer "distance, it shall be liable to a penalty for unjust discrimination."

There, the complaint set up a violation of this statute, and demanded a penalty of $5,000 thereunder. The railroad company demurred to that complaint. There, the Illinois Supreme Court

said in its opinion: "That while the statute of Illinois is inopera-
" tive upon that part of the contract which has reference to the
" transportation outside of the State, it is binding and effectual as
" to so much of the transportation as was within the limits of the
" State of Illinois." (Opinion, p. 564; also 104 Ill., 476).

This court expressly held:

" If the Illinois statute could be construed to apply exclusively
" to contracts for a carriage which begins and ends within the State,
" disconnected from a continuous transportation through or into
" other States, there does not seem to be any difficulty in holding
" it to be valid. * * * The Supreme Court of Illinois having in
" this case given an interpretation which makes it apply to what we
" understand to be commerce among the States, although the con-
" tract was made within the State of Illinois, and a part of its per-
" formance was within the same State, we are bound, in this court,
to accept that construction" (pp. 564, 565).

Hall vs. DeCuir, 95 *U. S.*, 485, was cited as a leading and controlling case, and some of the identical language which we have quoted was there quoted with approval (pp. 570, 571).

Applying that case to railroad transportation the court there said:

" Whatever may be the instrumentalities by which this trans-
" portation from the one point to the other is effected, it is but one
" voyage, as much so as that of the steamboat on the Mississippi
" River. It is not the railroads themselves that are regulated by
" this act of the Illinois Legislature so much as the charge for
" transportation, and, in language just cited, if each one of the
" States through whose territories these goods are transported can
" fix its own rules for prices, for modes of transit, for times and
" modes of delivery, and all the other incidents of transportation to
" which the word 'regulation' can be applied, it is readily seen that
" the embarrassments upon interstate tranportation, as an element
" of interstate commerce, might be too oppressive to be submitted to.
" 'It was', in the language of the court cited above, 'to meet just
" such a case that the commerce clause of the Constitution was
" adopted.'

" It cannot be too strongly insisted upon that the right of con-
" tinuous transportation from one end of the country to the other is

"essential in modern times to that freedom of commerce from the "restraints which the State might choose to impose upon it, that "the commerce clause was intended to secure. This clause, giving "to Congress the power to regulate commerce among the States and "with foreign nations, as this court has said before, was among the "most important of the subjects which prompted the formation of "the Constitution. *Cook vs. Pennsylvania*, 97 *U. S.*, 566, 574; *Brown "vs. Maryland*, 12 *Wheat.*, 419, 446. And it would be a very feeble "and almost useless provision, but poorly adapted to secure the "entire freedom of commerce among the States which was deemed "essential to a more perfect union by the framers of the Constitu- "tion, if, at every stage of the transportation of goods and chattels "through the country, the State within whose limits a part of this "transportation must be done could impose regulations concerning "the price, compensation, or taxation, or any other restrictive "regulation interfering with and seriously embarrassing this com- "merce" (pp. 572, 573).

In *Covington B. Co. vs. Kentucky*, 154 *U. S.*, 204, a corporation was indicted for not complying with the law fixing the rates for the use of the bridge of the corporation. After litigation it was found guilty and fined $1,000. The questions presented were (1) whether the legislation impaired a contract; (2) regulated commerce; or (3) deprived the Bridge Company of property without due process of law. The court cited *Hall vs. DeCuir*, with approval (p. 215), and *Wabash R. Co.*, with approval (pp. 216, 217). It was apparently claimed, fixing toils for people to pass was not interstate commerce, but the court quoted *Gibbons vs. Ogden*, 9 *Wheat.*, 1 *and* 189, with approval on this point, and said: "The thousands of people who "daily pass and repass over this bridge may be as truly said to be "engaged in commerce as if they were shipping cargoes of mer- "chandise from New York to Liverpool. While the Bridge Company "is not itself a common carrier, it affords a highway for such "carriage" (pp. 218, 219).

The court further said:

"The authority of the State, so frequently recognized by this "court, to fix tolls for the use of wharves, piers, elevators, and im- "proved channels of navigation, has always been limited to such as "were exclusively within the territory of a single State, thus affect-

"ing interstate commerce but incidsntally, *and cannot be extended to "structures connecting two States without involving a liability of contro-"versies of a serious nature*" (p. 221.)

Here we have a structure, a railroad, of rails and bridges, connecting many States. It is a great artery of commerce over which passengers and freight pass to such an extent that its annual gross revenue is substantially forty million dollars a year. Competition has made its rates so low it has paid no dividends for years, notwithstanding this great income. It is a far more important artery of commerce than the Mississippi River was but a few years ago. It is subject to the laws of the States through which it passes in many things, because they permitted its creation by delegating to it the power of eminent domain. If they frame legislation in such a way as to interdict acts inimical to life, health, or property within their respective domains, they may exercise their police powers upon this corporation while subject to their jurisdiction. But when a State undertakes to fix the prices that passengers shall pay for transportation, the books they shall receive, the mileage tickets they shall get, the rights and privileges they shall be entitled to, and undertakes to enforce such provisions over the line or lines of an interstate railroad, and then the courts of the State hold a railroad liable for penalties for refusing to make or sell such books or tickets in the language of the statute, I think the case is brought squarely within the decisions quoted and the principles laid down in those decisions. If the legislation reviewed in the cases referred to embarrassed and interfered with the free flow of commerce, and thus became a regulation of commerce, contrary to the Constitution of the United States, this must be much more the case at the present time, when Congress has given the Interstate Commerce Commission power to condemn all "unjust," or "unreasonable" rates, and all "undue" discrimination, upon all interstate railroads. When two of the decisions relied on were made, Congress had not exercised this power, but, having exercised the power to regulate commerce as to railroads, as to the prices they may pay, the rates or charges they may make, it is perfectly clear, under all the cases, that no State may interfere in this domain. The Act of Congress providing for the free movement of interstate passengers and freights by rail was to "regulate" interstate commerce and make interstate commerce and railroads free even in the State itself,

as to the manner of doing interstate business (*Ill. C. R. vs. Ill.*, 163 *U. S.*, 142). If, however, the judgment rendered by the New York courts can stand, a precedent exists that will permit every State to embarrass, hamper and interfere with the movement of passengers and freight, to such an extent that commerce will cease to flow untrammelled, as it does now, under the protection of the Constitution of the United States. That this flow may continue, and this country may become the established leader of all nations in international commerce, it is essential that all such precedents as that created by the New York courts should be swept aside. The Interstate Commerce Act and the Postal Roads Act are a sufficient regulation of interstate commerce and railroads by Congress. Therefore, in the language of the Wabash case already quoted, "if each one of "the States can fix its own rules for *prices*, for *modes* of transit, * * "and all other incidents of transportation * * * the em- "barrassments might be too oppressive to be submitted to. It was " * * * to meet just such a case that the commerce clause of "Constitution was adopted."

Nor do the cases cited by the learned Judge in the opinion of the court below require a different ruling on this point.

In *W. U. T. Co. vs. James*, 162 *U. S.*, 650, it was held that State legislation requiring the Telegraph Company to transmit and deliver messages received within the State "with due diligence," or pay a penalty, did not directly interfere with or regulate interstate commerce. The decision there was rested on the ground that such legislation "may incidentally affect commerce and the persons engaged in it," without necessarily constituting "a regulation of commerce" (p. 656). *Hall vs. DeCuir* was there cited and quoted as laying down the true rule (pp. 657, 658, 660).

In *Hennington vs. Georgia*, 163 *U. S.*, 299, legislation of Georgia forbade the running of freight trains "on any railroad in the State on Sunday." An opinion of Judge Thurman while on the bench in Ohio was quoted as furnishing the true foundation of the decision there rendered, in these words:

"We are, then, to regard the statute under consideration as a "mere municipal or police regulation, whose validity is neither "strengthened nor weakened by the fact that the day of rest it "enjoins is the Sabbath Day. Wisdom requires that men should

"refrain from labor at least one day in seven, and the advantages "of having the day of rest fixed, and so fixed as to happen at "regularly recurring intervals, are too obvious to be overlooked. "It was within the constitutional competency of the general "assembly to require the cessation of labor, and to name the day of "rest." (P. 305.)

Even this decision, however, was not rendered without strong dissent.

In *Lake Shore vs. Ohio*, 173 *U. S.*, 285, the Legislature of Ohio requires three passenger trains to stop daily, Sunday excepted, at cities or villages containing over three thousand inhabitants, for a sufficient time to receive and let off passengers. The claim was that this was a regulation of interstate commerce when applied to the trains of the Lake Shore & Michigan Southern Railway Company. The court held otherwise, however, citing *Hennington vs. Georgia* as an authority in point. The court quoted with approval from the previous decision, in these words, as the root of its decision:

"Local laws of the character mentioned have their source in the "powers which the States reserved and never surrendered to Con- "gress, of providing for the public health, the public morals and "the public safety, and are not, within the meaning of the Con- "stitution, and considered in their own nature, regulations of inter- "state commerce, simply because, for a limited time, or to a limited "extent, they cover the field occupied by those engaged in such "commerce (p. 291).

In that case the court expressly recognizes the soundness of the decision in *Hall vs. DeCuir*, 95 *U. S.*, 488; *Wabash vs. Illinois*, 118 *U. S.*, 555; *and Illinois Central R. R. Co. vs. Illinois*, 163 *U. S.*, 142. (See opinion, pp. 303–307).

These are all the cases cited, and the opinion in the very last one clearly shows that the authorities on which we rely here are applicable and controlling. They are applicable and controlling because here we have a regulation of the price to be paid, and the character of the contract to be made by a passenger on an interstate railway, and certainly such requirements are of the very essence of the regulation of interstate commerce as to passengers. On the

other hand, the cases referred to by the court below are cases where the health or the convenience of citizens was subserved by the legislation within the State, and where, instead of a direct interference with interstate commerce, or regulation of it, there was no attempt to directly interfere with it. In those cases the effect was incidental and indirect, and being along the line reserved to the States, the legislation of the States was upheld. Here, however, we have a case where the very power granted to Congress is interfered with by the State, its legislation and its courts, and, therefore, we insist that the legislation complained of is void and the judgment rendered is erroneous because it attempts to enforce it.

V.

The judgment of the New York courts should be reversed, with costs, and the case remanded to those courts, with instructions to proceed in accordance with the decision of this court.

Respectfully submitted,

ADELBERT MOOT,

Counsel for Plaintiff in Error,

BUFFALO, N. Y.

BUFFALO, N. Y.:
PRINTING HOUSE OF JAMES D. WARREN'S SONS,
Office of "The Buffalo Commercial."
1902.

Supreme Court of the United States.

ERIE RAILROAD COMPANY, Plaintiff in Error,
against
ALBERT L. PURDY, Defendant in Error.

This is a consolidation of twenty-one actions brought in the Supreme Court of the State of New York by Albert L. Purdy against the Erie Railroad Company, each, to recover a penalty under Chapter 1027, Laws of 1895, as amended by Chapter 835, laws of 1896 of the State of New York. The material portion of the act of 1895 is as follows: "Every railroad corporation operating a railroad in this state the line or lines of which are more than one hundred miles in length, * * * shall issue mileage books entitling the holder thereof to travel one thousand miles on the line or lines of such railroad. * * * * Any railroad corporation which shall refuse to issue * * * * shall forfeit fifty dollars, to be recovered by the party to which such refusal is made." The amendatory matter inserted by the amendment of 1896 relates to the manner of issuing and use of the books. The answers, each, in substance, alleged the act an interference with the right of Congress to regulate commerce among the several states and therefore void as in contravention to article I of the Constitution of the United States.

The same question was raised on a motion for non-suit. No other federal question was raised. A verdict was ordered for the plaintiff in the first ten causes of action and a non-suit granted as to the remainder, and the exceptions heard in the first instance at the Appellate Division of the Supreme Court, where judgment was ordered for the plaintiff on the verdict and from the judgment the defendant appealed to the Court of Appeals, and the judgment of the court below was affirmed. The Court of Appeals construed the statute in question as applicable to transportation wholly within the state, only. The railroad company applied for and was allowed a Writ of Error to the Supreme Court of the State of New York.

It is alleged that the Supreme Court committed error in holding that the act in question does not violate Article XIV of the Constitution of the United States, and also that the Supreme Court erred in holding that the act in question does not violate Article I of the Constitution of the United States.

Now comes the defendant, in proper person, and moves the court to dismiss the Writ of Error herein for want of jurisdiction and uniting a motion to affirm the judgment of the court below, on the ground that the question on which the jurisdiction depends is so frivolous as not to need further argument.

1st. There is no federal question involved, for the reason that the construction placed upon chapter 1027 of the laws of 1895, as amended by chapter 835 of the laws of 1896, of the State of New York, that the statute applies, only, to transportation wholly within the State of New York, as construed by the Court of Appeals, and as so construed does not infringe upon or

against the constitution of the United States, and hence to dismiss the Writ of Error.

2nd. The record upon this Writ of Error discloses that no Federal question was raised in the Supreme Court in this action, other than that the said statutes were void, as an attempt to regulate commerce among the several states, and thereby in violation of article I of the Constitution of the United States and the construction placed upon the statute in question by the Court of Appeals, limiting it to transportation wholly within the state is binding on this court and the only question before this court is merely its jurisdiction, and the question on which jurisdiction depends is so frivolous as not to need further argument, and hence to affirm the judgment below.

ALBERT L. PURDY,
Defendant in Error in person.

To Adelbert Moot, counsel for plaintiff in error:

Take notice.—That the foregoing motion to dismiss or for judgment of affirmance will be submitted to the court for determination at a session thereof commencing Monday, December 10th, 1900, at the Capitol in the city of Washington, before the justices thereof, and the annexed printed brief and argument will be filed and relied upon by me for such motion.

ALBERT L. PURDY,
Defendant in Error in person.

Dated, November 16th, 1900.

Supreme Court of the United States.

ERIE RAILROAD COMPANY, Plaintiff in Error,
against
ALBERT L. PURDY, Defendant in Error.

Motion to dismiss Writ of Error or to affirm judgment.

Brief and argument of defendant in error on motion to dismiss Writ of Error on the ground that no federal question is involved and that the Court has no jurisdiction and uniting a motion to affirm the judgment on the ground that although the record may show that the Court has jurisdiction, it is manifest that the question on which jurisdiction depends is so frivolous as not to need further argument.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

Reported below 162 N. Y. 43.

Twenty one actions were brought by the defendant in error against the plaintiff in error, to recover, in each action, the sum of fifty dollars, penalty, for the failure of the plaintiff in error to issue and sell on demand to the defendant in error a mileage book, as required by the provisions of Chapter 1027 of the Laws of 1895 as amended by Chapter 835 of the Laws of 1896. We compare these laws below.

The act of 1895, appears at the left hand, above and below the matters inserted in the act as amended in 1896, the amendatory matter inserted in 1896 being in brackets.

The mileage book act of 1895, being chapter 1027 of the Laws of 1895. Took effect June 15th, 1895.	Chapter 1027 of the laws of 1895, as amended by Chapter 835 of the Laws of 1896. Took effect May 22nd, 1896.
"Every railroad corporation operating a railroad in this state, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile and not more than three cents per mile,	"Every railroad corporation operating a railroad in this state, the line or lines of which are more than one hundred miles in length, and which is authorized by law to charge a maximum fare of more than two cents per mile, and not more than three cents per mile,
	(and which does charge a maximum fare of more than two cents a mile)
shall issue mileage books	shall issue mileage books
	(having one thousand coupons attached thereto,)
entitling the holder thereof	entitling the holder thereof
	(upon complying with the conditions hereof)
to travel one thousand miles	to travel one thousand miles

on the line or lines of such railroad, for which the corporation may charge a sum not to exceed two cents per mile.

on the line or lines of such railroad, for which the corporation may charge a sum not to exceed two cents per mile.

(Such mileage books shall be kept for sale by such corporation at every ticket office of said corporation in an incorporated village or city and shall be issued immediately upon application therefor. The holder of any such mileage book shall be entitled, upon surrendering, at any ticket office on the line or lines of such railroad, coupons equal in number to the number of miles which he or any member of his family or firm, or a salesman of such firm, wishes to travel on the line or lines of such railroad to a mileage exchange ticket therefor. Such mileage exchange ticket shall entitle the holder thereof without producing the mileage book upon which such exchange ticket was issued, to the same rights and privileges in respect to the transportation of person and property to which the highest class ticket issued by such corporation would entitle him. Such mileage books shall be good until all coupons attached thereto have been used.)

Any railroad corporation which shall refuse to issue a mileage book as provided in this section, or, in violation thereof, to accept such mileage book for transportation shall forfeit fifty dollars, to be recovered by the party to which such refusal is made."

Any railroad corporation that shall refuse to issue a mileage book as provided in this section, or, in violation thereof to accept such mileage book for transportation, shall forfeit fifty dollars, to be recovered by the party to which such refusal is made."

The twenty one actions were consolidated and tried as one action. A verdict was given in favor of the defendant in error for the penalties in the actions numbered 1 to 10 both inclusive and a non-suit was granted in the actions numbered 11 to 19, both inclusive and "A" and "B."

The plaintiff in error was incorporated November 14th, 1895, as appears from the memorandum of the certificate in evidence on page 65 of the record.

The complaints in the first ten actions appear in the record at pages 4 to 24 and the answers on page 49-53.

In the answer it is alleged that the act in question is an interference with interstate commerce and the same question is made in the FIFTH ground for non-suit at page 103 of the record.

This is the only exception taken to rulings upon Constitutional questions raised.

The exceptions taken by the plaintiff in error to the rulings of the Court in the first ten causes of action, only, were heard

at the Appellate Division of the Supreme Court, Fourth Department, pursuant to the order of the trial court. No other questions were raised there. Judgment was ordered on the verdict, which was entered as directed, in favor of the defendant in error and against the plaintiff in error, on the 17th day of October, 1898, for $1171.09.

No opinion was written.

The plaintiff in error appealed to the Court of Appeals and the judgment was there affirmed, with costs. The opinion written by Cullen, J., appears in the record at pages 116–120.

On March 6th, 1900, the costs on this appeal were taxed at $134.69 and an order entered in favor of the defendant in error and against the plaintiff in error, therefor.

The Smith case declaring the mileage book law of Michigan unconstitutional was decided by this Court after the decision by the Appellate Division, in this case, and the plaintiff in error sought to raise for the first time, on the argument before the Court of Appeals, the same questions raised in the Smith case. The Court discussed the question as to whether the statute of 1895, though void as to existing railroad companies, is not constitutional and valid as to companies organized in the future, and also the question as to whether the act of 1896, passed subsequently to the incorporation of the plaintiff in error increased the burden imposed by the act of 1895, and held that it did not, but the Court held that the objections and exceptions taken by plaintiff in error were not sufficient to present the question sought to be raised and stated, "and the rule seems settled that such an objection, to be available here, must have been raised in the Courts below (Vose v. Cockroft, 44 N. Y., 415; Delaney v. Brett 51 N. Y., 78.)"

The statute was also construed as applying to transportation wholly within the state.

The plaintiff in error has sued out this Writ to bring its exceptions here for review. The assignment of errors appears on page 120. It is claimed that the act in question violates Article I of the Constitution of the United States, which provides that Congress shall have power to regulate commerce among the states.

It is also assigned as error, that the Supreme Court of the State of New York erred in not holding the act in question void as against Article XIV of the Constitution of the United States.

But no such question was raised in the Supreme Court of the State.

The Defendant in error makes this motion to dismiss the WRIT OF ERROR in this case upon the ground that there is no federal question involved. The Court of Appeals having construed the statute as applicable only to transportation within the state, such interpretation is conclusive upon this Court. There being also united a motion to affirm the judgment on the ground that, although the record may show that the Court has jurisdiction, the question on which jurisdiction depends is so frivolous as not to need further argument.

FIRST

The Act in question does not interfere with interstate commerce.

The law, as construed by the Court of Appeals, has reference to transportation, only, wholly within the state, and such interpretation will bind this Court.
DeSaussure v. Gaillard, 127 U. S. 216, (8 Sup. Ct. 1053—1061.)
Tullis v. L. E. & W. R. Co., 175 U. S. 348, (20 Sup. Ct. 136—138.)
Stone v. Wisconsin. 94 U. S. 181—183.
Morley v. L. S. & M. S. R. Co., 146 U. S. 162, (13 Sup. Ct. 54.)
People v. Roberts, 171 U. S. 658, (19 Sup. Ct. 58.)

In M. K. & T. R. Co. v. McCann, 174 U. S. 580. (19 Sup. Ct. 755—758,) the rule is laid down as follows:

"But the elementary rule is, that this Court accepts the in-
"terpretation of the statute affixed to it by the Court of last re-
"sort thereof."

Accepting the act as construed by the Court of Appeals, to apply only to transportation wholly within the state, there can be no federal question in the case.

SECOND.

The claim that the act violates article XIV of the Constitution of the United States, made in the assignment of errors, cannot be considered here.

The jurisdiction of the Court of Appeals is limited to reviewing questions of law raised in the Courts below and appearing in the record. (See opinion, page 119 of the record.)

Likewise, a question sought to be raised here, not appearing in the record to have been set up or raised in the trial Court according to the law and practice of the state, will not be heard.
Morrison v. Watson. 154 U. S. 111, (14 Sup. Ct. 995.)
Chappell v. Bradshaw, 128 U. S. 132, (9 Sup. Ct. 40.)
Winona & St. P. L. Co. v. Minnesota, 159 U. S. 526, (16 Sup. Ct. 88.)
Walker v. Sauvinet, 92 U. S. 90, (23 L. Ed. 678—679.)
Hamilton M'f'g. Co. v. Mass, 73 U. S. 632, (18 L. Ed. 904—905.)
Miller v. State, 153 U. S. 535, (14 Sup. Ct. 874.)
Brown v. Commonwealth, 144 U. S. 573, (12 Sup. Ct. 757.)
Tripp v. Santa R. R. Co., 144 U. S. 122, (12 Sup. Ct. 655.)

No federal question other than that raised in the Supreme Court of the state can be raised here. The one federal question raised in the trial court will not help the plaintiff in error to interject another question here, not interposed there according to the state practice.

In Murdock v. Mayor, 87 U. S. 590, (22 L. Ed. 429—441,) the law is carefully reviewed on this question.
Wilson v. McNamee, 102 U. S. 572.
Cooley Const. Lim. (6th Ed.) 19—20.

The case of Dewey v. City of D., 173 U. S. 193, (19 Sup. Ct. 379) and Keokuk & H. B. Co., v. Illinois, 175 U. S. 626, (20 Sup. Ct. 205—208,) are conclusive upon this question.

The claim or allegation in the answer that the act in question is void because it is in violation of various other provisions of the Constitution of the United States, is too indefinite to be considered. Maxwell v. Newbold, 59 U. S., (18 How.) 511, (15 L. Ed. 506.)

Messenger v. Mason, 77 U. S., (10 Wall.) 507, (19 L. Ed. 1028.)

THIRD.

The claim of the plaintiff in error that the mileage book law violates article XIV of the Constitution, as we understand it, announced, as decided in the case of L. S. & M. S. R Co., v. Smith 173 U. S. 684, must presuppose some property rights in the plaintiff in error, existing at the time of the passage of the act, for the Constitutional prohibition, so far as property rights are concerned, is directed to those rights, then existing. But plaintiff in error had no existence, it had no property, it had no rights, at the time of the passage of the act in question. How could the law interfere with it or its rights? How could the act violate the obligation of a contract not yet made? To make the act void the objection must have existed at the time of its passage. The law in question took effect June 15th, 1895. The contract between the incorporators of the plaintiff in error and the state whereby it came into existence was made November 14th, 1895. This contract is its charter, granted, subject to the laws then existing. It is only laws passed subsequent to the incorporation that can be said to affect its chartered rights, under article XIV of the Constitution.

This principle accords with the decisions of the courts holding that contracts are made with reference to the laws then existing.

McLean v. Pennington, 1 Paige, (N. Y.) 108—109. People v. Quigg, 59 N. Y., 89. Cooley's Const. Lim. (6th Ed.) 344—345. Bartholf v. Reilly, 74 N. Y., 509—516. Mather v. Bush, 16 John., (N. Y.) 233—249. Hicks v. Hotchkiss, 7 John. Ch., (N. Y.) 297, 305, 306—312. Ogden v. Saunders, 12 Wheat., 213, 259, 266, 295, 296, 297. Kelly v. McCarty, 3 Bradf. Sur., (N. Y.) 7, 11.

The plaintiff in error, an artificial being, created by law, has no personal rights and no property rights except such as was given to it in its creation.

Perrin v. Ches. & D. C. Co., 9 How. (U. S.) 172—184. New York Fire Ins. Co. v. Ely, 5 Conn. 560, 567, 568. Head v. Providence Ins. Co., 2 Cranch, U. S., 127, 156, 168. Dartmouth College v. Woodward, 4 Wheat., 518, 636.

All the laws of the state existing at the time of the incorporation of the plaintiff in error on November 14th, 1895, including the mileage book law, formed its charter or contract with the state giving it its existence. The plaintiff accepted the benefits and assumed the burdens imposed by such laws, as the consideration for its existence.

Cooley's Const. Lim. (6th Ed.) 479. People v. Bernard, 110 N. Y., 548, 556. Mayor v. Broadway, 17 Hun. 242. Ashley v. Ryan, 153 U. S., 436, (14 Sup. Ct. 865. Railroad Co. v. Gibbs, 24 S. C., 60, 27, S. C., 385. L. & N. R. Co. v. Kentucky, 161 U. S., 677, (16 Sup. Ct., 714—724.) Philadelphia v. Pennsylvania, 52 Pa. St., 451. Bushwick v. Ebbetts, 3 Edw., Ch. (N. Y.) 353. Owens v. St. L. & S. R. Co., 83 Mo. 454. Nolensville v. Quinby, (8 Humph.) 28 Tenn., 476. Alabama & V. R. Co. v. Odeneal, 73 Miss., 34, (19 So. 202.) McCandless v. Richmond & D. Ry. Co., 38 S. C. 103, (18 L. R. A., 440.) Pierce v. Sommerset Ry. Co., 171 U. S., 641, (19 Sup Ct. 64.)

In Lehigh Water Co. v. Borough of Easton, 121 U. S., 388, (7 Sup. Ct. 916,) it being claimed that the contract forming the company's charter had been violated, as in this case, by a law passed prior to the incorporation, the Court said:

"It is equally clear that the law of the state to which the "Constitution refers in that clause must be one enacted "after the making of the contract, the obligation of which is "claimed to be impaired."

The same principle is also applied in the cases of

Ohio & M. Ry. Co. v. McClure, 77 U. S. (10 Wall.) 511, (7 Sup. Ct.)

Denny v. Bennett, 128 U. S., 498, (9 Sup. Ct., 134, 136.)

Brown v. Smart, 145 U. S., 454, (12 Sup. Ct., 958.)

Waters P. O. Co. v. Texas, 177 U. S., 28, (20 Sup. Ct., 518, 525.)

In Turner v. Board of Com., &c., 175 U. S., 461, (19 Sup. Ct., 464,) Mr. Justice Peckham writing the opinion, it is said:

"But in this case we have no power to examine the correctness of the decision of the Supreme Court of North Carolina, because it being a writ of error to a State Court, we cannot take jurisdiction, under the allegation that a contract has been impaired by a decision of that court, when it appears that the State Court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued; there being no subsequent legislation touching the subject. We are therefore bound by the decision of the State Court in regard to the meaning of the constitution and laws of its own state, and its decision upon such a state of facts raises no federal question."

FOURTH.

The law of 1895, stood, after the enactment of 1896, as first enacted except as modified by the amendment.

Matter of Prime, 186 N. Y., 347.

Matter of Wards, 154 N. Y., 342.

ALBERT L. PURDY,
Defendant in Error in person.

SUPREME COURT OF THE UNITED STATES.

THE ERIE RAILROAD COMPANY,
PLAINTIFF IN ERROR

AGAINST

ALBERT L. PURDY.

BRIEF FOR THE APPELLEE.

CLARENCE A. FARNUM,
Counsel for Appellee,
Wellsville, N. Y.

STATEMENT.

This is a writ of error to the Court of Appeals, the Supreme Court of the State of New York, bringing here for review the decision of the Court of Appeals affirming the order and judgment of the Appellate Division of the Supreme Court, Fourth Department, which denied the motion for a new trial made by the Erie Railroad Company, defendant below, plaintiff in error here, and ordered judgment against it in favor of Albert L. Purdy, the defendant in error, on the verdict directed at the Trial Term.

The case is reported below in 162 N. Y. 42-52; 48 L. R. A. 669. Twenty-one actions were brought by said Purdy against the said Railroad Company to recover penalties under the mileage book act or statute of the State of New York. The actions were consolidated by orders found at pages 61-64 of the Record herein. A verdict was directed by the Trial Court in favor of the plaintiff Purdy (the defendant in error here) and againts the defendant railroad company (the plaintiff in error here) for the penalties in each of the first ten causes of action and in favor of the defendant railroad company in the last eleven causes of action.

The railroad company only sought to review the action of the Trial Court.

The only Federal question raised by the defendant, railroad company upon the trial or at any time prior to the argument in the Court of Appeals was that the Act in question was an attempt on the part of the legislature of the State of New York to regulate commerce among the states and so in violation of the Constitution of the United States and void (Record page 103).

The defendant railroad company was organized and incorporated under the laws of the State of New York, November 14, 1895 under the general laws of the state for the incorporation of railroads (Record page 65) which incorporation occurred after the mileage book act of 1895 was in full force.

The mileage book act in force at the time the defendant railroad company was incorporated was passed June 15, 1895, and known as chapter 1027 of the general laws of that year, and was amended May 22, 1896 by chapter 835 of the laws of the State of New York.

These Acts are printed in full in the Brief of the counsel for the plaintiff in error, filed herein December 10, 1900 upon motion to dismiss this Writ of Error, and will be found at pages 34 and 35 of such Brief.

The counsel for the plaintiff in error not having filed any Brief upon the merits herein other than to which I have alluded, it is assumed he expects to rely upon that as his exposition of the case upon its consideration now by this Court upon the merits.

POINTS AND ARGUMENT.

I.

The plaintiff in error can urge in this Court no Federal question other than the one taken by him upon the trial of the issues in the case, namely, that the mileage book Act of the State is in violation of the United States Constitution in its attempt to regulate commerce among the states.

The defendant's case was tried upon the theory that the Act was an attempt upon the part of the state to regulate commerce among the states, and it must now be confined to the Federal question raised below in the trial court. Numerous questions other than those of a Federal nature were raised by it, but of course, none of them can be considered here. The Federal question was raised by the defendant company when the plaintiff had rested its case, by its motion for a nonsuit, which motion is set out in full at pages 102 and 103 of this Record. The Court of Appeals recognized this statement of the situation to be correct for in the opinion of the Court by Judge Cullen, writing for the Court, he says (Page 119 this Record) "No particular ground for the attack on the complaint is stated. At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole

ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. *The objection that the statute was an invasion of the defendant's property rights and contravened for that reason either the Constitution of the United States or the constitution of this State does not anywhere appear in the Record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below.*"

The allegations in the answers of the defendant corporation that the statute in question "is unconstitutional and void because it is in violation of various other provisions of the Constitution of the United States, and of the Constitution of the State of New York" is too indefinite under the common law system or any Code system of pleading to tender an issue, and it has been so held by the court of last resort of the state of New York, and such ruling being upon local law must be conclusive upon this Court (See Purdy v. Erie R. R. Co. 162 N. Y. pages 50–51). So, having raised one Federal question only in the court below by its pleading and by its conduct of the trial, it is confined in the appellate court to the points made upon the trial (Id.: Dodge v. Cornelius, 168 N. Y. 242, 245.)

See also, Maxwell V. Newbold 59 U. S., (18 How.) 511. (15 L. Ed. 506.) Messenger v. Mason, 77 U. S., (10 Wall.) 507, (19 L. Ed. 1028.)

Capital City Dairy Co. v. Ohio, 22 Sup. Ct., 120, 124.

The Supreme Court will not consider questions not raised and passed upon in the court below, nor will the raising of one Federal question in the state court permit the consideration of other Federal questions than the one raised. (U. S. Revised Statutes § 709; *Wilson v. McNamee*, 102 U. S. 572; *Keokuk & Hamilton Bridge Co. v. Illinois*, 175 U. S. 626; 20 Sup. Ct. 205; *Dewey v. City of Des Moines* 173 U. S. 193; 19 Sup. Ct. 379; *Messenger v. Mason*, 10 Wall. 507 *Maxwell v. Newbold*, 18 How. 511.

If a party seek to raise a Federal question in this court by a writ of error to the state court he should distinctly point out to the court below wherein and whereby a Federal law has been violated. It must appear by the record that the point upon which he relies was made in the court below and decided against him, and that the provision of law in question was brought to the notice of the state court, and the right which

he now claims asserted before the trial court. (*F. G. Oxley Stave Co. v. Butler County* 166 U. S. 648; 17 Sup. Ct. 709; *Hoyt v. Thompson*, 1 Black 518; 17 Law. Ed. 65.)

In this case the opinion of Judge Cullen clearly shows no Federal question was raised by the pleadings nor considered other than the one of an attempt by the state to regulate commerce among the states.

II.

This Act of the Legislature of the State of New York does not attempt to regulate commerce between the states, and does not purport to nor could it act outside of the state.

The opening paragraph of the Act in question is, "Every railroad corporation operating a railroad *in this State* * * * shall issue mileage books."

The state had the power to regulate rates within its own confines.

(*Stone v. Farmers' Loan & Trust Co.* 116 U. S. 307; 6 Sup. Ct. 334; *Chicago & Grand Trunk Ry. Co. v. Wellman* 143 U. S. 339; 12 Sup. Ct. 400: *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150; 17 Sup. Ct. 532; *Hopkins v. U. S.* 171 U. S. 578; 19 Sup. Ct. 40; *N. Y. N. H. & H. R. Co. v. New York* 164 U. S. 502; 17 Sup. Ct. 418.)

Every statute is presumed to be constitutional and every possible presumption is to be indulged in favor of the validity of the statute (*Mugler v. Kansas*, 123 U. S. 623; 8 Sup. Ct. 273; *Munn v. Illinois*, 94 U. S. 113.

Even if it could be thought the Mileage Book Act intended to operate upon interstate commerce as well as upon intrastate transportation, it would be held invalid only as to the former and a proper exercise of the legislative power upon the latter for the objectional part is clearly separable, and the residue of the act pertaining to intrastate transportation may be enforced without reference to the invalid portion. (*Reagan v. Farmer's Loan & Trust Co.* 154 U. S. 362: 14 Sup. Ct. 1047.)

But the Court of Appeals of the State of New York, the court of last resort in that state, having held that this Act applies only to points of transportation within the State of New York, such determination is conclusive upon this Court, the determination being one of local law. (*Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 388: 21 Sup. Ct. 101.)

III.

The statute objected to being in force at the time the defendant railroad company became incorporated in November 1895, it does not lie within the power of the company to assert its invalidity.

The acts of the legislature of the state of New York, requiring railroad corporations thereafter incorporated to issue mileage books to persons applying therefor contain nothing wicked *per se;* it is not against public policy; it takes away no right ever granted a corporation; it does not violate the obligation of any contract, nor deprive the corporation organized under its laws after the passage of the acts, of its property without due process of law, nor is it an undue interference with the management of its property. (See opinion of the Court in this case in the Court of Appeals, 162 N. Y. 42–52: this Record, pages 116–120.)

The legislature of the state had power to refuse the incorporation of the defendant company; it had the power to construct railroads itself had it seen fit, and had power to impose fares, tolls and rates for transportation. If it granted the defendant company the privilege, not the right, of having corporate life it had the power of imposing reasonable conditions as a consideration for giving it existence, and can it be said that it is an unreasonable requirement that railroads thereafter incorporated shall issue to its people asking it, a mileage book entitling the holder thereof to travel one thousand miles upon its railroad within the state upon the payment to the corporation of twenty dollars? I deem the question so free from doubt that only one answer can be suggested. (*See Baltimore & Ohio R. Co. v. Maryland*, 21 Wall. 473; 22 Law. Ed. 678; *Pinney v. Nelson*, Decided by this Court December 2, 1901, reported in 22 Sup. Ct. 52–55: *Hale v. Lewis*, 181 U. S. 473; 21 Sup. Ct. 677; *John Hancock Mut. L. Ins. Co. v. Warren*, 181 U. S. 73; 21 Sup. Ct. 535 *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28; 20 Sup. Ct. 518.) *Cooley's Cons't. Lim.* (6th ed.) 479–480: *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677; 16 Sup. Ct. 714; *Ashley v. Ryan*, 153 U. S. 436; 14 Sup. Ct. 865: *Louisville & N. R. Co. 2. Kentucky* 22 Sup. Ct. 95. 99; *Capital City Dairy Co. v. Ohio* 22 Sup. Ct. 120, 123.)

IV.

The case of LAKE SHORE & M. S. Ry. Co. v. SMITH, 173 U. S. 684; 19 Sup. Ct. 565 relied upon by counsel for the plaintiff, in error as governing this is not applicable.

The Court of Appeals of the State of New York in its discussion of this case (162 N. Y. 42–52) clearly distinguishes the cases, and in the case of *Beardsley v. N. Y. L. E. & W. R. R.* Co. 162 N. Y. 230, argued with this case, recognized the force of the *Smith Case*, and held the *Beardsley* case governed by it. The chief distinguishing features are that in the *Beardslee* case the defendant corporation was organized prior to the passage of the Mileage Book Acts, and the defendant company in that case had in the lower Court raised the question which was passed upon adversely to the corporation, that the act deprived the company of its property without due process of law (162 N. Y. 234) and so was permitted to raise the question and have it passed upon by the appellate court. Here, with the case in hand, the Mileage Book Act was in full force when the defendant corporation applied for and was granted its corporate existence, and must take its character subject to the laws of the state of New York, and bound as firmly by them as if the law itself had been expressly recited in its certificate of incorporation. (*Cooley's Cons't. Lim.* 6th Ed. 479; *Mayor v. Broadway & 7th Ave. R. R.* Co. 17 Hun 242, 244, 245; *Ashley v. Ryan*, 153 U. S. 436; 14 Sup. Ct. 865).

The defendant company has not been deprived of any property or property rights by any statutory enactment made since its incorporation. The Act of 1895 imposed the obligation or burthen of issuing Mileage Books, which was placed upon it as a condition for its incorporation, and making the act in fact a part of its charter, and the Act of 1896 was a mere regulation regarding the form of the books, their sale and use, and contains nothing to the detriment of the defendant company. The provision of the Federal Constitution that no state shall deprive any person of property without due process of law, must, like that provision enjoining the impairing of the obligation of contracts, refer only to laws enacted after the making of the contract or obligation claimed to be impaired. (*Lehigh Water Co. v. Borough of Easton*, 121 U. S. 388; 7 Sup. Ct. 916; *Turner v. Board of Com. Wilkes* Co. 173 U. S. 461; 19 Sup. Ct. 464; *Pinney v. Nelson*, 22 Sup. Ct. 52, 54.)

The law of 1895 after its amendment in the year 1896, stood

as first enacted, except as modified by the amendment. (*Matter of Warde*, 154 N. Y. 342; *Matter of Prime*, 136 N. Y. 347; Laws of New York 1892 Chapter 677, § 32: as amended by laws 1894 Ch. 448 *Matter of Davies*, 168 N. Y. 89, 100.)

V.

The Court of Appeals of the State of New York, the highest court of the state, having affirmed this judgment of Purdy against the defendant railroad company (162 N. Y. 42) upon either of two grounds, namely, (1) that the Act in question applied to railroad transportation wholly within the state, and was not a regulation of commerce among the states, and also. (2) that the objection that the Act invaded the property rights of a corporation in violation of the State or Federal Constitutions, was not available in the Court of Appeals because not taken below, this Court is without jurisdiction to hear the case upon the merits, and should dismiss, for the judgment may well be supported upon the ground not involving a Federal question.

Rutland R. Co. v. Cent. Vt. R. Co. 159 U. S. 630: 16 Sup. Ct. 113; *Pierce v. Somerset Ry.* 171 U. S. 641; 19 Sup. Ct. 64; *Seeberger v. McCormick*, 175 U. S. 274; 20 Sup. Ct. 128.)

VI.

A summary of the position of the appellee, briefly stated is (1) that the plaintiff in error in this court is confined to one question only, namely, that the Mileage Book Act is in violation of the United States Constitution in its attempt to regulate commerce among the states, for that was the only Federal question raised in the court below; (2) that the highest court of the state having determined that the statute applied only to transportion within the state of New York, is conclusive upon this Court; (3) that the statute of which it complains having been in force at the time it received its corporate existence, and not being objectionable *per se.* the corporation takes subject to it and cannot urge that its property is taken by the act without due process of law, and (4) that the Court of Appeals having before it another question other than a Federal question, its judgment may be supported without involving the Federal question.

It is respectfully submitted that this judgment should be affirmed or the writ of error dismissed.

CLARENCE A. FARNUM, Counsel for the Appellee,

A. L. PURDY,

WELLSVILLE, NEW YORK.



Supreme Court of the United States.

No. 171.—October Term, 1901.

The Erie Railroad Company, Plaintiff in Error, vs. Albert L. Purdy. } In error to the Supreme Court of the State of New York.

[April 7th 1902.]

Mr. Justice Harlan delivered the opinion of the Court.

Twenty-one actions were brought by Purdy against the Erie Railroad Company, a corporation of New York, to recover penalties under what is known as the Mileage Book Act of that State, being chapter 1027 of the Laws of 1895 which took effect June 15th 1895, as amended by chapter 835 of the Laws of 1896 which took effect May 22d 1896.

The complaint and answer in each case were the same.

Each answer alleged "upon information and belief that the said act known as chapter 835 of the Laws of 1896, is unconstitutional and void, because it is in violation of the provisions of the Constitution of the United States which commits to Congress the sole power to regulate commerce between the several States, and that it is unconstitutional and void because it is in violation of *various other provisions* of the Constitution of the United States and of the Constitution of the State of New York."

This was the only reference, special or general, in the answers, to the Constitution of the United States.

The twenty-one actions were consolidated into one action subject to the plaintiff's right to recover in each one as if they had been separately tried.

At the conclusion of the evidence in behalf of the plaintiff the railroad company moved for a non-suit in each action upon various grounds, the only one that can be regarded as specially setting up or claiming a Federal right or immunity being the fifth, which stated that if the State legislation under which the defendant sought to recover penalties was intended to apply to the railway lines of defendant the acts of the legislature were void, "because they undertake to interfere with or regulate commerce among the States and the acts of Congress in such case made and provided."

It was not assigned as a ground of non-suit that the statute in question was in violation "of various other provisions" of the Constitution of the United States." Apparently, that ground of defense was abandoned at the trial.

The trial court granted the motion for non-suit in the last eleven cases, and directed a verdict in favor of the plaintiff for $50 each in the first ten cases; and ordered that the exceptions of each party be heard in the Appellate Division in the first instance, all proceedings in the meantime being stayed.

In the Appellate Division the exceptions of the railroad company were overruled and judgment was ordered for the plaintiff with costs, and that judgment was affirmed in the Court of Appeals of New York. *Purdy* v. *Erie R. R. Co.*, 162 *N. Y.* 42, 50, 51.

That court, speaking by Judge Cullen, said: "At the opening of the trial the defendant moved to dismiss the complaint because it failed to state facts sufficient to constitute a cause of action for a penalty. No particular ground for the attack on the complaint is stated. At the close of the evidence the defendant renewed its motion to dismiss the complaint, but the sole ground on which it assailed the validity of the statute itself was that it constituted an interference with the regulation of interstate commerce, and hence was in violation of the Constitution of the United States. The objection that the statute was an invasion of the defendant's property rights, and contravened for that reason either the Constitution of the United States or the Constitution of this State, does not anywhere appear in the record, and the rule seems settled that such an objection, to be available here, must have been raised in the courts below. *Vose* v. *Cockroft*, 44 *N. Y.* 415; *Delaney* v. *Brett*, 51 *N. Y.* 78."

Again: "The objection that the statutes of 1895 and 1896 are regulations of interstate commerce, and hence in conflict with the Federal Constitution, is satisfactorily dealt with in the very clear opinion of Mr. Justice Merwin, of the Appellate Division, delivered in the *Beardsley* case, 15 *App. Div.* 251. That such a statute, if limited in its scope to transportation wholly within the limits of the State, is a valid exercise of State authority is settled by the decision of the Supreme Court of the United States in *Stone* v. *Farmers' Loan & Trust Co.*, 116 *U. S.* 307, where it was said: 'It (the State) may, beyond all question, by the settled rule of decision in this court, regulate freights and fares for business done exclusively within the State.' This doctrine has never been overruled or limited; on the contrary, it is fully recognized in the later cases. *Hennington* v. *Georgia*, 163 *U. S.* 299; *W. U. Tel. Co.* v. *James*, 162 *U. S.* 650; *L. S. & M. S. R. Co.* v. *Ohio*, 173 *U. S.* 285. In *Wabash etc. R'y Co.* v. *Illinois*, 118 *U. S.* 557, a statute of Illinios regulating fares was held void solely on the ground that the act, as interpreted by the Supreme Court of the State, included cases of transportation partly within and partly without the State. It was there stated: 'If the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there

does not seem to be any difficulty in holding it to be valid.' There is nothing in the language of the statutes now before us that shows they were intended to affect any but interstate transportation; but if their interpretation is doubtful 'the courts must so construe a statute as to bring it within the constitutional limits, if it is susceptible of such construction.' *Sage* v. *City of Brooklyn*, 89 *N. Y.* 189; *People* v. *Terry*, 108 *N. Y.* 1. Within this principle, these statutes must be construed as applying to transportation wholly within the State, and as so construed they do not infringe upon the Constitution of the United States."

In a petition for the allowance of a writ of error from this court, the railroad company for the first time expressly referred to the Fourteenth Amendment of the Constitution of the United States as affording it protection against the statute of New York. The same ground was repeated in the assignments of error for this court.

We are asked to determine whether the judgment of the Court of Appeals of New York affirming the judgment of the Supreme Court of the State did not deny to the railroad company a right or immunity secured to it by that clause of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law or deny to any person within its jurisdiction the equal protection of the laws.

This question cannot be determined by this court unless it has jurisdiction to review such final judgment of the Court of Appeals of the State.

The statute defining the authority of this court to re-examine the final judgment of the highest court of a State, gives it jurisdiction "where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission or authority." *R. S.* § 709.

By its answer and its motion for a non-suit at the close of the plaintiff's evidence, the defendant did distinctly claim that the statute of New York in question was inconsistent with the power of Congress to regulate commerce among the several States. But the Court of Appeals held that the statute was intended to apply and applied only to domestic transportation. We accept this view as to the scope and operation of the statute, and assume that it does not require the railroad company to issue mileage tickets covering the transportation of passengers from one State to another State. So that no Federal question arising under the commerce clause of the Constitution is here for determination.

But the defendant insists that the general allegation in each of its answers, namely, that the statute, besides being void as a regulation of interstate commerce, was in violation "of various other provisions" of the Constitution of the United States, was sufficient to have enabled him, at the trial, to insist that the statute, upon which the actions were based, was repugnant to the Fourteenth Amendment of the Federal Constitution. If the answer had contained no such specific allegation, still, if at the trial of the case the defendant had, in stating the grounds of his motion for nonsuit, or in some other way, distinctly claimed that the statute, on which the actions were based, was inconsistent with that Amendment, then it would have been the duty of the Court of Appeals to determine the question so raised, unless it was waived by the defendant when the case was before that court, or unless its determination could properly be and was placed upon some ground of local or general law adequate to dispose of the case. We state the matter in this way because, as said in *Carter* v. *Texas*, 177 *U. S.* 442, 447, "the question whether a right or privilege, claimed under the Constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a State court, is itself a Federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the State. *Neal* v. *Delaware*, 103 *U. S.* 370, 396, 397; *Mitchell* v. *Clark*, 110 *U. S.* 633, 645; *Boyd* v. *Thayer*, 143 *U. S.* 135, 180."

So, if the highest court of the State, by its final judgment, sustains the validity of a State enactment drawn in question there as repugnant to the Constitution, treaties or laws of the United States, or denies a right, privilege or immunity specially set up or claimed in that court for the first time under the Constitution or any treaty, statute or authority exercised under the United States, this court could review that judgment, although no Federal question was distinctly raised or insisted upon in the trial court.

In the present case the statute was not drawn in question in the trial court as invalid under any clause of the Constitution except the one relating to commerce. It was not even asserted there to be invalid under "various other provisions" of that instrument. The statements in the motion for non-suit, that "the cause of action alleged in such action has not been proved," and that "no cause of action has been proved in either of the actions consolidated in the action on trial," were too vague and general to indicate that the defendant claimed anything under that Amendment. The record before us is consistent with the idea that the defendant did not claim, in the trial court, in any form, generally or specially, that the statute deprived it of its property without due process of law or denied to it the equal protection of the laws.

We therefore cannot hold that the Court of Appeals, by its final judgment, sustained the validity under the Constitution of the United States of

the statute drawn in question by the defendant, or that it denied any right or immunity now claimed by it under the Fourteenth Amendment; for that court simply declined to consider any Federal question except that made under the commerce clause of the Federal Constitution, assigning as the reason therefor that no point was made at the trial in respect of any other clause of that instrument. In so holding, the court followed the settled rule of practice in that State. On that practice alone was based its refusal to consider a Federal question not brought to the attention of the trial court. *Vose* v. *Cockroft*, 44 *N. Y.* 415; *Delaney* v. *Brett*, 51 *N. Y.* 78.

Now, where a party—drawing in question in this court a State enactment as invalid under the Constitution of the United States, or asserting that the final judgment of the highest court of a State denied to him a right or immunity under the Constitution of the United States—did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment and hold that the State enactment was unconstitutional or that the right or immunity so claimed had been *denied* by the highest court of the State, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the State practice. *Spies* v. *Illinois*, 123 *U. S.* 131, 181; *Miller* v. *Texas*, 153 *U. S.* 535, 538; *Morrison* v. *Watson*, 154 *U. S.* 111, 115. Of course, if upon examining the record this court had found that a Federal question was properly raised or that a Federal right or immunity was specially claimed, in the trial court, then our jurisdiction would not have been defeated by the mere failure of the highest court of the State to dispose of the question so raised or to pass upon the right or immunity so claimed.

It results from what has been said that no Federal question is sufficiently presented by the record for our determination; consequently, the writ of error must be dismissed for want of jurisdiction in this court.

It is so ordered.

Mr. Justice GRAY did not hear the argument or take part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.